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PRINCIPLES OF COMPANY LAW

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PRINCIPLES
OF
COMPANY LAW

BY
HIS HONOUR
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BENCHER OF LINCOLN'S INN

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to it will not be surprised at the many and important changes in the law which appear in the 1948 Act, as they follow very closely the recommendations of that Committee. The most important difference is that the elaborate recommendations of the Committee for forming a register of "Nominee Shareholdings," or the beneficial interest in shares held, have been omitted ; but, to compensate for this, very wide powers have been conferred upon the Board of Trade to investigate the beneficial ownership and control of shares, where they think it requisite, and to interrogate officers of the company, and others, backed up by powers to impose penalties.

Some of the most outstanding changes in the Act relate to prospectuses. A few of the obligations under the Act of 1929 have been released or modified ; for instance, the troublesome and unnecessary provision which required the contents of the memorandum to be set out has been rescinded ; but other important requirements have been added.

Another important change which may save considerable expense is the provision that the objects clause of the memorandum of association may be altered by special resolution without the sanction of the Court, subject however to safeguards.

Another novelty is a provision requiring directors to retire on reaching the age of seventy. This however is subject to so many methods of evasion that it is perhaps hardly likely to have much practical effect.

Perhaps the most important, and certainly the most voluminous and complicated, of the new provisions are those relating to balance sheets and accounts which are aimed at securing the fullest and most instructive

The original object of this book was to state the elements of company law in clear and simple language, illustrated by decided cases, the facts and decisions in each case being shortly stated. This of course always involved the omission of some detail, and now that the law has become more than ever complicated, it has been found necessary to simplify the statement of the existing law by summarising, rather than fully stating, the more complicated exceptions and modifications which accompany nearly all the new provisions. The statement is accordingly for the most part confined to the present law as now taking effect under the new Act, without going into details of the history of the changes which have been made from time to time.

As this book has in the past been used to a considerable extent by accountants and students in accountancy, special notes have been inserted, as before, for their attention, and in addition the complicated provisions of the Eighth Schedule relating to the balance sheets and accounts of single and holding companies have been set out in full in the appendix as well as being summarised in the text, and specimen balance sheets and profit and loss accounts in modern form have also been included in the appendix, as well as the Ninth Schedule containing the matters to be set out in the auditors' reports.

The author is indebted to Mr. Maurice Estrin, A.S.A.A., for supplying specimen forms of balance sheets and profit and loss accounts and to Mr. J. W. Pryke for compiling a very complete and well-planned index.

A. F. TOPHAM

July, 1948.

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CHAPTER I

INTRODUCTION

By far the most usual and most important form of company is a "Company Limited by Shares under the Companies Act" (a). This form of company will be dealt with almost exclusively in this book.

Suppose a number of persons intend to combine for the purpose of carrying on some business. If there are only a few of them, they may form a partnership; but if their numbers are at all large, or if they wish to limit their individual liability for losses, they will most probably decide to form or "promote" a company limited by shares under the Companies Act. This proceeding is in outline very simple. They must first decide five things. The **object** which the company is to carry out is probably agreed already: there remain the **name** of the company, the **place** where the business is to be carried on, **how far each member undertakes to be responsible for losses** and the **amount of funds** which they consider necessary to carry on the business properly. Their decision on these points is embodied in a document called a Memorandum of Association, which must be signed by at least seven persons (b), who must each agree to take one or more shares in the company. The Memorandum so signed is taken to an official at

(a) The Companies Act, 1948, 11 and 12 Geo. 6 Ch. 38, has consolidated all previous legislation relating to limited companies and will be usually referred to in this book as "the Companies Act."

(b) Two in case of a private company, see p. 250, *post*.

Bush House, Kingsway, London (c), called "**The Registrar of Companies**," fees are paid, the registrar enters the new company on the register and prepares a certificate of incorporation, and the company is complete.

The **Memorandum of Association** then contains—

1. The name of the company, which may be almost anything, provided it ends with the word "Limited";
2. The situation of the registered office of the company;
3. The objects or powers of the company;
4. How the liability of members is limited; and
5. The amount of the capital of the company.

It is a most important document, for on it the existence of the company and all its powers depend. It fixes the powers and objects of the company as between the company and the outside world—and these powers and objects must not be exceeded by the company, even if every member agrees, though they can be altered or extended by the proper procedure (d).

The persons who are to form the company must then arrange how the business is to be carried on. If the members are numerous, the whole body cannot manage, and some provision must be made for the division of the profits or losses. All such matters are dealt with in the "**Articles of Association**." This is usually a much longer document than the Memorandum, and generally provides for the appointment of **directors** (or managers of the business for the company), for settling the rights of the holders of **shares**, stating how these are to be allotted among the members, that **share certificates** shall be given to the members as evidence of their right to their shares and that a **register** of members shall be kept as further evidence. The members generally reserve power

(c) See note (r) on p. 23.

(d) See p. 28, *post*

to control the acts of the directors in many matters, and this leads to provision for **meetings** of members, for **votes** and the passing of resolutions of different kinds (e). Thus the whole internal management of the company is dealt with in the **Articles**. They form a binding contract between all the members and the company ; but the Articles may be changed in the manner provided by the Companies Act.

The persons forming the company may not be able to find all the capital necessary for the successful working of the business. If so, they will invite the public to join in the undertaking and subscribe for shares. This is done by means of a **prospectus**.

The **capital** may be of any amount, divided into shares of any amount. It may be £10,000,000 divided into 100,000 shares of £100 each, or £10 divided into 200 shares of 1s. each.

Any person who acquires one or more shares becomes a **member**, or in other words, a **shareholder** or **contributory** of the company, and becomes liable, either at once or when called upon, to pay to the company the money which his share represents.

When a company borrows money, it often gives to the lenders a charge or mortgage over its property and hands to the lenders as evidence of their charge documents called **debentures**.

A company comes to an end by being **wound up** ; a **liquidator** is appointed and takes possession of all the property of the company, and, after paying the debts, he distributes it among the members. Debts secured by **debentures** or other charges are, of course, paid before unsecured debts.

(e) Resolutions may be (1) Ordinary ; (2) Extraordinary ; (3) Special. See pp. 229, 230.

CHAPTER II

THE NATURE OF A LIMITED COMPANY

BESIDES limited companies registered under the Companies Acts there are several other forms of associations for the purpose of carrying on business.

In this chapter limited companies are contrasted with some of the more important of these forms.

I.—AS CONTRASTED WITH PARTNERSHIP

Partnership

(a) the “**firm**” is not a distinct “person”; it is made up of the several persons who compose it.

Thus a firm of A. & Co., is in law A. and B. and C. and D., and the property of the firm belongs to all the members in common. Consequently partners cannot make contracts with the firm, and judgment creditors can seize the goods of any partner.

Limited Companies

A company is a distinct being or *persona*.

Thus the company S. and Co., Limited, is an entirely different person from Mr. S., even though he started it and manages it and owns practically all the shares. The property is the property of S. & Co., Limited, and not of Mr. S. He can make contracts with the company, and his goods cannot be seized for the debts of the company.

Salomon v. Salomon & Co., Ltd., [1897] A. C. 22

S. had a boot business. He sold the business to a company which he formed with a capital of £40,000. There were seven members, his wife, daughter and four sons, who took one £1 share each, and S. himself, who took 20,000 shares.

The price paid by the company to S. was £30,000; but instead of paying him cash, the company gave him 20,000 fully-paid £1 shares and £10,000 in debentures (*i.e.* he lent the £10,000, which the company owed him for purchase-money, to the company on mortgage).

Owing to strikes in the boot trade the company was wound up. The assets of the company amounted to only £6000 out of which to pay the £10,000 due to S. and secured by debentures, and a further £7,000 due to unsecured creditors.

The unsecured creditors claimed that as S. & Co. was really the same person as S.,—he could not owe money to himself and that they should be paid their £7,000 first.

Vaughan Williams, J., and the Court of Appeal, held that the company was a mere agent for S., and he must indemnify his agent against the losses it had sustained, by paying the £7,000 himself; but it was held by the House of Lords:—

Once the company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant.

The company could not be agent for S., for either—

- (1) it was a legal person—then it acted for itself; or
- (2) it was not—then it could not be an agent at all.

The company was not defrauded, as all the shareholders knew all about it.

The company is in law a different person altogether from the subscribers to the Memorandum.

Result.—S. kept the £6,000 in part payment of his loan to the company.

This is perhaps the most important case in company law, and every student should read for himself the judgment of Lord MACNAGHTEN on p. 47 of the report.

Partnership**Limited Companies**

- | | |
|---|--|
| <p>(b) One partner cannot transfer his share without the consent of the others.</p> | <p>Shares are freely transferable.</p> |
|---|--|

Partnership—*cont.*

(c) Each partner is an agent of the firm to make contracts (Partnership Act, 1890, s. 5).

(d) The liability of each partner for the debts of the firm is unlimited, except in case of a limited partnership under the Limited Partnership Act, 1907 (a).

(e) Partners may make what private arrangements they like among themselves.

Limited Companies—*cont.*

A shareholder is not an agent for the company.

The liability of each shareholder may be limited either by shares or by guarantee.

There are some arrangements between members of a company which are not allowed, *e.g.*, the company cannot buy the shares of the members.

II.—UNINCORPORATED COMPANIES

These were like very large partnerships;⁷ but the shares were made transferable and the management was conducted by a body of directors. They were treated in law as big partnerships, and the liability of members was unlimited.

Such companies can no longer be created, for by the Companies Act no company or partnership of more than ten persons can be formed for the purpose of banking (s. 429), or of more than twenty persons for other business (s. 434), unless it is registered under the Act or incorporated by statute or letters patent.

(a) 7 Ed. VII. c. 24. Under this Act a partnership may consist of one or more "general partners" who are all liable for all the debts of the firm, and of one or more limited partners who bring in a specified amount of capital, and are not liable for more than the amount brought in. Such partnerships must be registered, and the limited partners cannot manage the business, or bind the firm.

III.—INCORPORATED COMPANIES

(A) By Royal Charter Limited Companies

(a) At common law the members are not liable for the debts of the Corporation (b); but the Charter may impose a liability on the members limited to their shares (c).

Members are liable up to the amount of their shares.

(b) The corporation has all the powers of an ordinary person and these powers cannot be modified even by the creating charter. But the Crown may annul the charter if the limit placed on the powers by the charter is disregarded (*Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 675, n).

The powers of a company depend on its Memorandum of Association (*Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653). If directors do an act which is not within the Memorandum, the shareholders cannot ratify it.

(B) By Special Act of Parliament (Statutory Companies).

Water and other companies which want compulsory powers to take land and power to carry on a business which may cause a nuisance must be incorporated by a special Act of Parliament. The provisions of the special Acts required in each case were found to be very similar; consequently several public statutes were enacted containing general provisions, and one or more of these Acts are adopted in each private Act, *e.g.* :

(b) I. Blackst. 484.

(c) 7 Will. III. & 1 Vict. c. 73.

The Companies Clauses Consolidation Act, 1845,
defines the liability of shareholders and regulates borrowing powers, granting of certificates and the constitution of such companies generally.

The Lands Clauses Consolidation Act, 1845,
deals with compulsory purchase of land, notices to be given, how the land is to be conveyed, and the purchase-money paid, etc.

Statutory Companies	Limited Companies
(a) The powers are limited by the special Act which creates the company and to which it owes its whole existence.	The powers depend on the Memorandum.
(b) The liability of members is limited as follows: By s. 36 of the Companies Clauses Act, if execution is levied against the company, and there is not enough to pay the debt, the creditor may issue execution against the shareholders to the extent of their shares. (d).	Limited by shares or guarantee.
(c) The company can only borrow money when the whole of its capital has been subscribed and at least half actually paid up, and even then can usually only borrow to the extent of one-third of its capital.	The borrowing powers of the company are usually unlimited, but may be limited by the Memorandum.

(d) This can be done by application to a judge under R.S.C.O. XLII, r. 23.

Statutory Companies—*cont.* Limited Companies—*cont.*

- (d) The company cannot lease its undertaking without the consent of Parliament. If the Memorandum allows it, the company can lease the whole or part of its undertaking.

IV.—BUILDING SOCIETIES, INDUSTRIAL, PROVIDENT, AND FRIENDLY SOCIETIES

These are governed by their own special Acts. They are not companies, but the liability of members is limited.

V.—OTHER COMPANIES UNDER THE COMPANIES ACT

1. Unlimited companies :

The liability of the members is not limited at all.

These companies are not numerous. Their position is much the same as companies incorporated under the Act of 1844, which was repealed by the Companies Act, 1862. A Company under the Act of 1844 could hold property and sue in its own name, but the liability of members remained unlimited.

See further Chapter XIX, *post*.

2. Companies limited by guarantee :

Each member undertakes to be liable to pay the debts of the company up to a certain amount ; but the capital of the company is not usually divided into shares.

Further details of this form of company will be found in Chapter XIX, *post*.

CHAPTER III

FORMATION OF A COMPANY

SECTION I

The Preliminary Contract

VERY frequently a company is formed for the purpose of purchasing an existing business or property: then the promoters of the company are in this difficulty; they do not want to go to the expense of forming the company until they have a binding contract from the owner of the business (or vendor) to sell it to the company; but, on the other hand, the company cannot make a binding contract until it is incorporated.

Sometimes a preliminary contract is made between the vendor and some person who acts as agent or trustee for the company about to be formed.

The position of the agent is curious, because a person cannot act as an agent for another person who is not yet in existence; therefore—

(1) The Company, when it comes into existence, is not bound by the contract.

Re English & Colonial Produce Co. Ltd., [1906]
2 Ch. 435

A solicitor, on the instructions of persons who became the directors of the company, prepared the Memorandum and Articles before its formation:—**Held**, the company was not liable to pay the solicitor's costs, although it had taken the benefit of his work (see the judgment of VAUGHAN WILLIAMS, L. J., at p. 441(a)).

(a) Expenses of registration cannot be recovered from the Company in the absence of an express or implied request on the part of the Company that they should be paid (*Re National Motor Mail-Coach Co., Ltd., Clinton's Claim* [1908] 2 Ch. 515).

(2) The company cannot sue the vendor on the contract.

Natal Land, etc. Co. v. Pauline Colliery Syndicate, Ltd., [1904] A. C. 120

The N. Company agreed with Mrs. C., as agent of the Pauline Syndicate before its formation, that the company would grant a lease of a mine to the syndicate. The syndicate was registered, and discovered a seam of coal. The company refused to carry out the contract :—**Held**, there was no binding contract between the company and the syndicate.

And (3) The agent remains personally liable on the contract, even if it is afterwards ratified by the company (*Kelner v. Baxter* (1866), L. R. 2 C. P. 174).

Hence it is usual to provide in the contract that

- (a) If the company adopts the agreement, the agent's liability shall cease ; and
- (b) If the company does not adopt the agreement within (say) two months, either party may rescind the contract ; so that the agent escapes liability in either event. Then, as soon as the company is incorporated, it enters into a **new agreement** with the vendor to carry out the terms of the preliminary agreement.

Such a new agreement may be implied by the acts of the company (see *Natal Land, etc. Co. v. Pauline Colliery Syndicate Ltd.*, [1904] A. C. 120, at p. 126).

Note, that the agent could probably sue the vendor on the contract and recover damages, if he has suffered any.

If the contract is made with a "Trustee" for the company, the position is similar; for a trustee is personally liable on contracts which he makes on behalf of the beneficiary, and the company is not bound by the contract and cannot enforce it or ratify it; since the person who purported to act as trustee for the company before it was formed could not have had any authority to do so (b).

As a consequence of these difficulties it is now becoming the more usual practice not to make any contract before the company has been incorporated; but to agree the form of a draft contract to be entered into by the vendor and the company after incorporation.

SECTION 2

Registration

(a) New Companies

Persons wishing to form a new company must produce to the Registrar of Companies

- (1) The Memorandum of association (c).
- (2) The Articles of association (c).
- (3) A list of the persons who have consented to become directors (d).
- (4) Written consents of the directors to act (e).
- (5) A statutory declaration that the requirements of the Act have been complied with (f).

The proper stamp duties must be paid (g) and the

(b) *Re Northumberland Avenue Hotel Co.*, (1886), 33 Ch. D. 16, at p. 20.

(c) Companies Act, s. 12.

(d) Companies Act, s. 181 (4).

(e) Companies Act, s. 181 (1) (a).

(f) Companies Act, s. 15 (2).

(g) 5s. registration stamp on each document, also 10s. each on the Memorandum and Articles and stamp duty on the capital as in Schedule XII of the Companies Act as well as 10s. per £100 on the nominal capital, Finance Act, 1933 (23 & 24 Geo. 5, c. 19), s. 41.

Registrar enters the name of the company on the register.

The company then comes into existence; but it cannot commence business until it has complied with section 109 of the Companies Act (see p. 60), unless it is a private company (see Chapter XVIII) (*h*).

(b) Existing Companies

Any company which existed before the Companies Act (1862) may be registered under the Companies Act (*i*), if it has seven members, except—

- (1) an unregistered company after a winding up has commenced (*k*);
- (2) companies (other than joint stock companies) in which the liability of members is limited by Act of Parliament.

Existing companies are not bound to register under the Act.

Form.

Such a registration can take place with the consent of a three-quarters majority of members present at a general meeting of the company (*l*), and the following information must be supplied to the Registrar:—

1. A list of members.
2. A copy of the charter or deed of settlement of the company.
3. The amount of the nominal capital.
4. The number of shares into which it is divided.
5. The number of shares taken and the amount paid.
6. The name of the company, with the addition of the word "limited" (*m*).

(*h*) Or a company having no share capital; and see other exceptions in s. 109 (7).

(*i*) Companies Act, s. 382.

(*k*) *Re Hercules Insurance Co.* (1871), L.R. 11 Eq. 321

(*l*) Companies Act, s. 382 (1) (v).

(*m*) Companies Act, s. 384.

SECTION 3

The Certificate of Incorporation

When the Memorandum has been signed and the fees paid, the registrar enters the name of the new company in the register, and hands over a certificate of incorporation in the following form :

"I hereby certify that Blank Company, Limited, is this day incorporated under the Companies Act, 1948, and that the company is limited."—Given under my hand at London this 4th day of July, 1948.

The certificate is conclusive evidence that all the requirements of the Companies Act, in respect of registration and of matters precedent and incidental thereto, have been complied with, and that the association is a company authorised to be registered, and duly registered under the Companies Act (n).

The certificate is conclusive evidence that the company was formed on the date appearing on the certificate, and the company is taken to have been in existence during the whole of the day (o).

A company registered outside Great Britain which establishes a place of business within Great Britain is now known as an "Oversea Company" (p). It must deliver to the registrar

- (a) a copy of its charter or memorandum and articles ;
- (b) a list and particulars of directors and secretary ;
- (c) the name of a person in Great Britain on whom process may be served ;
- (d) a copy of a balance sheet in the same form as the balance sheet which a company under the Companies Act is required to keep (q).

(n) Companies Act, s. 15. See also *Re Walker and Smith*, (1903), 72 L. J. (Ch.) 572, where an invalid reduction of capital was held valid because the registrar had certified it.

(o) *Jubilee Cotton Mills, Ltd. (Official Receiver and Liquidator) v. Lewis*, [1924] A. C. 958.

(p) Companies Act, s. 406.

(q) Companies Act, ss. 407 and 410.

CHAPTER IV
MEMORANDUM OF ASSOCIATION

THE COMPANIES ACT, 1948

Company Limited by Shares

Memorandum of Association of Blank Company,
Limited.

1. The name of the company is "Blank Company Limited."

2. The registered office of the company will be situate in England.

3. The objects for which the company is established are :

(a) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of Blank Brothers, and with a view thereto to enter into the agreement referred to in clause 3 of the company's Articles of Association, and to carry the same into effect with or without modification.

(b) To carry on business as brewers, maltsters, corn merchants, distillers, hop merchants, wine and spirit merchants and importers, manufacturers of aerated and mineral waters and other drinks, licensed victuallers, hotel keepers, beerhouse keepers, restaurant keepers, lodging-house keepers, farmers, dairymen, ice merchants and

tobacconists, and to buy, sell, and deal in commodities of all kinds.

- (c) To enter into partnership or into any arrangement for sharing profits or joint adventure with any person or company carrying on or about to carry on any business which this Company is authorised to carry on, or any business capable of being conducted so as directly or indirectly to benefit this Company and to acquire or join in acquiring any such business.
- (d) To purchase, take on lease, or to exchange, hire, subscribe for, or otherwise acquire, and to hold and deal with any property, real or personal including patents, patent rights, inventions and concessions and shares, stocks, debentures or obligations of any company and upon a distribution of assets or division of profits to distribute any such property amongst the members of this Company in specie.
- (e) To make, draw, accept, endorse, negotiate, discount, buy, sell and deal in bills, notes and other negotiable or transferable instruments.
- (f) To borrow and secure the payment of money in such manner and on such terms as the Directors may deem expedient, and to mortgage or charge the undertaking and all or any part of the property and rights of the Company, present or future including uncalled capital.
- (g) To lend money to any person or company and to guarantee the performance of any contracts.
- (h) To pay for any business, property or rights acquired or agreed to be acquired by this Company, and generally to satisfy any obligation of this Company, by the issue or transfer of shares of this or any other company, credited

as fully or partly paid up, or of debentures or other securities of this or any other company.

- (i) To sell, exchange, let, develop, dispose of or otherwise deal with the undertaking, or all or any part of the property of this Company, upon such terms and for such price or other consideration of any kind as the Company in General Meeting may think fit.
- (j) To promote or assist in or contract with any person or company for the promotion of any company for the purpose of acquiring all or any of the property and liabilities of this Company or for any other purpose.
- (k) To remunerate or make donations to any persons whether Directors, officers or agents of this Company or not, for services rendered or to be rendered in or about the conduct of the Company's business.
- (l) To invest and deal with the moneys of the Company not immediately required, upon such securities and in such manner as may from time to time be determined by the Directors.
- (m) To establish and support funds or institutions calculated to benefit employees or ex-employees of the Company, or its predecessors in business or the dependants or connections of such persons, and to grant pensions and allowances, and to subscribe or guarantee money for charitable objects.
- (n) To do all such other things as are incidental or conducive to the attainment of the objects above specified.

And it is hereby declared that the word "Company" in this clause, except where used in reference to this Company, shall be deemed to include any partnership or other body of persons whether incorporated or not incorporated, and whether formed or carrying on business in the United Kingdom or elsewhere, and that the objects specified in each paragraph of this clause, except paragraph (n), shall be separate and independent objects of the Company and shall not be limited or restricted by reference to the terms of any other paragraph or the name of the Company.

4. The liability of the members is limited.

5. The capital of the company is £25,000, divided into 25,000 shares of £1 each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names.

Names, Addresses, and Descriptions of Subscribers	Number of Shares taken by each Subscriber
* John Jones, of	One
William Smith, of	One
Thomas Brown, of	One
Benjamin Green, of	One
Andrew Black, of	One
Arthur Drew, of	One
John Smith, of	One

Dated this 18th day of December, 1948.

Witness to all the above written signatures,

GEORGE BROWNE.

The Memorandum of Association is often very much longer than this form (a), the objects of the Company being expressed at very great length. Extreme verbosity is, however, quite unnecessary, provided that power to do everything which a company may want to do is expressly inserted in wide and clear terms.

This chapter should be read as explaining the form, clause by clause.

SECTION 1

Clause 1.—The Name

Any name may be chosen subject to the following restrictions

1. The last word of the name must be "limited" (aa).
2. No company may be registered by a name which, in the opinion of the Board of Trade is undesirable (b).
3. The name should not resemble that of any other existing company or firm (bb).

As to 1.—When an old business is turned into a limited company, the old name is often retained with the addition of "limited." There is no limit to the length of the name, but for practical purposes it is convenient for the name to be as short as possible, e.g. "Chic Limited."

The name (with the word "**limited**") must be painted (c) or affixed on the outside of every office or

(a) This form was settled some years ago by the author for use by a private company, the promoters of which desired to avoid unnecessary expense.

(aa) Sect. 2 (1).

(b) Companies Act, s. 17.

(bb) See p. 21, *post*.

(c) Companies Act, s. 108 (1) (a). Penalty, £5 a day; and the same, if a person, not being a limited company, uses the word "Limited." Companies Act, s. 439.

place in which business of the company is carried on, in a conspicuous position, easily legible, and mentioned in all business letters, notices, and other official publications, cheques (*d*), advertisements, bills, etc., of the company.

This is to ensure that all persons dealing with the company shall have clear notice that the liability of the members is limited.

The Registration of Business Names Act, 1916, now applies to every company carrying on business under a business name which does not consist of its corporate name, and accordingly the name under which the business is carried on and the other particulars required by the Act must be registered (*e*). The names of the directors must also appear on Catalogues, Circulars, etc., unless the company is specially exempted by the Board of Trade. (*f*)

If the company makes a contract without the use of the word "limited," (*g*) the effect may be most serious for the officers of the company; suppose, for instance, Mr. Salomon, contracting on behalf of his company, had omitted the word "limited," the contract would have been made by him personally (*h*);

Atkins & Co., Ltd. v. Wardle (1889), 58 L. J. (Q. B.) 377

A, B, and C, the directors of the South Shields Salt Water Baths Co., Limited, accepted bills thus:—"Accepted A, B, C, directors of the S. Shields Salt Water Baths Company." **Held**, the directors were personally liable.

There is one exception to the rule that the word "limited" must be used. **Companies formed to promote art, science, etc.**, which do not propose to pay

(*d*) Companies Act, s. 108 (1) (*c*).

(*e*) Companies Act, 1947, s. 58. (This Section not repealed by the 1948 Act).

(*f*) Companies Act, s. 201.

(*g*) An abbreviation such as "Ltd." may be used. *Stacey & Co., Ltd. v. Wallis* (1912), 106 L. T. 544.

(*h*) *Penrose v. Martyr* (1858), E. B. & E. 499; *Chapman v. Smethurst*, [1909] 1 K. B. 927.

dividends, but to apply all gains towards the working of the company, may register a name **without the word "limited"** (i). They thus become corporations, and can own property and sue in their own names, and the liability of the members is limited, *e.g.* Newnham College, Cambridge, and the Cyclists' Touring Club.

As to 2.—This was a new provision under the act of 1947. It takes the place of more elaborate provisions under the act of 1929.

As to 3.—A new company should not select a name so like that of an existing company or firm as to lead to confusion (k). The registrar would, no doubt, refuse to register such a name as being undesirable, or he might be restrained by injunction from registering it. Even if he does register it, he may require it to be changed (see p. 22, *post*) or the other company might get an injunction and have it removed.

But the Court will not interfere with the discretion of the Registrar unless he has exercised his discretion upon some wrong principle of law or has been influenced by matters which he ought not to have considered. (l)

This jurisdiction is not confined to cases where the name of the complaining company is actually registered.

**Société Anonyme des Anciens Établissements
Panhard et Levassor v. Panhard Levassor
Motor Co., Ltd., [1901] 2 Ch. 513.**

A well-known French company had no agency in England but their cars were used in England. An English company was formed with a capital of £100, and with only seven members, with a view to preventing the French company

(i) Companies Act, s. 19. A licence must be obtained from the Board of Trade, and it may be revoked.

(k) *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.*, [1907] 2 Ch. 312. *Kingston, Miller & Co., Ltd. v. Thomas Kingston & Co., Ltd.*, [1912] 1 Ch. 575. *Ewing v. Buttercup Margarine Co., Ltd.*, [1917] 2 Ch. 1.

(l) *R. v. Registrar of Companies*; [1912] 3 K. B. 23.

from being registered in England in their own name, and thus competing more successfully with English firms :—**Held**, the name of the English company must be struck off the register. The seven members were ordered, either—

- (1) to change the name with the consent of the Board of Trade, or
- (2) to wind up the company.

Before 1948 certain words such as Royal and Imperial were prohibited. This provision has now been repealed (*m*), rule 2 printed on p. 19 takes its place.

Change of Name

A company may change its name, either—

- (1) by special resolution with the consent of the Board of Trade, which will always be given if there is a good reason for the change ; or
- (2) If a company is registered by a name which in the opinion of the Board of Trade is too like the name of an existing company, it may change its name with the sanction of the Board of Trade, and it must do so, if so directed by the Board of Trade within six months of its registration (*n*).
- (3) A company not formed under the Act, seeking registration, may change its name with the approval of the Board of Trade if its name is in the opinion of the Board undesirable—provided a majority of the members present at a General Meeting assent (*o*).
- (4) A company formed to promote art, science, etc. which does not pay dividends, when changing its name, may omit the word " limited " with the consent of the Board of Trade (*p*).

(*m*) *By the Companies Act, 1947*, s. 78 (4).

(*n*) *Companies Act, s. 18 (2)*.

(*o*) *Companies Act, s. 388*.

(*p*) *Companies Act, s. 19 (2)*.

In order to prevent difficulties arising from a change of name it is enacted that all proceedings brought by or against the company in its old name remain good notwithstanding any change of name (*pp*).

SECTION 2

Clause II.—The Registered Office

Every company must have a registered office as soon as it commences business or within 14 days after incorporation, whichever is the earlier (*q*).

The Memorandum must state whether the office is to be in England (which includes Wales) or Scotland; such information is all that is required, for it is enough to show where the company will be registered; thus, if "in England," it will be registered at Bush House (*r*).

This fixes the nationality (*s*) of the company, and it cannot be changed without the consent of Parliament. But the situation of the office may be changed from one part of England to another by giving notice to the Registrar.

The register of members is usually kept there (see p. 79, *post*); writs and notices must be served there; but if there is no registered office, an order for substituted service will be made, or the writ may be served on the secretary and directors at an office which is not registered.

(*pp*) Companies Act, s. 18 (4).

(*q*) Companies Act, s. 107. There are penalties in case of default.

(*r*) This register was formerly kept at Somerset House but was transferred to Bush House, South-West Wing, London, W.C.2. It should be clearly understood that the register at Bush House kept by the Registrar is quite distinct from the company's own register of members kept by its own secretary.

(*s*) *Continental Tyre and Rubber Co. (Great Britain), Ltd. v. Daimler Co., Ltd.*, [1915] 1 K. B. 893. Nationality is however quite distinct from enemy character in time of war. S.C. 1916, 2 A. C. 307.

Re Fortune Copper Mining Co. (1870), L. R. 10 Eq. 390

The registered office of the company had been pulled down. The writ was served on the secretary and directors at an unregistered office.—**Held**, good service.

SECTION 3

Clause III.—The Objects of the Company

The company cannot do anything outside the powers given in the Memorandum—anything so done becomes *ultra vires*.

If an act is done by the directors which is *ultra vires* (beyond the powers of) the company, it is void, and the company cannot make it valid, even if every member assents to it.

Ashbury Railway Carriage and Iron Co. v. Riche (1875), L. R. 7 H. L. 653.

The Memorandum gave the company power to make and sell railway carriages. The directors bought a railway concession in Belgium. The Articles gave express power to the company to extend its business beyond the Memorandum by special resolution. The company passed a special resolution to ratify the purchase.—**Held**, the purchase was bad. "If every shareholder had been in the room, and if every shareholder has said, 'that is a contract which we authorise the directors to make,' it would be void. The shareholders would thereby by unanimous consent, have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing" (*per* Lord CAIRNS, L.C.).

This rule is meant to protect future shareholders and the public at large who deal with the company.

But if the act had been *ultra vires* (beyond the powers of) the directors only, the shareholders could have ratified it.

Or if it had been *ultra vires* the Articles, the company could have altered its Articles in the proper way.

See the last-mentioned case, at p. 674 of the report.

And, if an act is within the powers of the company, any irregularities are cured by the consent of all the shareholders (*l*).

The Company can also alter its Memorandum by the proper procedure (see pp. 28, 29, *post*) ; but it is doubtful whether such an alteration could validate *ultra vires* acts done before the alteration.

If property is acquired by *ultra vires* expenditure, the company's rights over it may be protected.

National Telephone Co. v. St. Peter Port Constables
[1900] A. C. 317.

The company put up telephone wires in Guernsey. The defendants cut them down. There was no power in the Memorandum to put up wires there.—**Held**, that fact alone would not prevent the company from suing for damage done to the wires (*u*).

The powers in the Memorandum must not, however, be construed strictly, and the company may do anything which is fairly incidental to the powers specified.

Foster v. London, Chatham and Dover Rail. Co.,
[1895] 1 Q. B. 711

The company acquired a piece of land for the purposes of its railway. The railway was erected on arches. The company let the arches as workshops, etc. The neighbours objected (on account of noise and rubbish), and claimed that it was *ultra vires*—**Held**, valid, as being fairly incidental to the powers of the company (*v*).

(*l*) *Re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466 ; *Parker and Cooper v. Reading*, [1926] Ch. 975.

(*u*) See also *Ayers v. South Australian Banking Co.* (1871), L. R. 3 P. C. 548 at pp. 558, 559.

(*v*) See also *County Hotel and Wine Co. v. London and North Western Rail. Co.*, [1918] 2 K. B. 251 ; *Evans v. Brunner, Mond & Co.*, [1921] 1 Ch. 359.

On the other hand, the following was held not to be incidental.

London County Council v. A.-G., [1902] A. C. 165

The council had power to run tramways. It ran omnibuses to feed the tramways.—Held, this was outside its powers.

N.B.—These were statutory corporations, but the same principle applies to the special statute as to a Memorandum of Association.

Powers not expressly mentioned in the Memorandum may be implied if they are warranted by the constitution of the company. Thus a trading company has implied power to borrow (see p. 140) and to sell land (*w*) and to give pensions or other rewards to its servants or employees (*x*).

Pensions or gratuities can, however, only be granted where they are granted *bona fide* for the benefit of the company and to promote its interests or prosperity (*y*).

A company may hold land in spite of the Mortmain Acts (*z*), unless it is formed for the purpose of promoting art, science, religion, charity, or other like object not involving the acquisition of gain (*a*). In such a case it cannot hold more than two acres of land without the licence of the Board of Trade (*z*).

The powers of a company are generally expressed in very wide terms, because it is very inconvenient for a company, or those dealing with it, to be in doubt as to the powers which the company has.

(*w*) *Re Kingsbury Collieries, Ltd. and Moore's Contract*, [1907] 2 Ch. 259.

(*x*) *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179.

(*y*) *Re Lee, Behrens & Co., Ltd.*, [1932] 2 Ch. 46.

(*z*) Companies Act, s. 14.

(*a*) As to what is "gain," see per Jessel, M. R., *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542 at p. 545, n.

At one time the Courts were inclined to construe these wide powers in a very narrow manner. A company usually has a **main object**, which is put first in the list of its objects—or there may be two or more main objects, as in clauses (a) and (b) in the form on p. 15, and detailed powers which are usually set out under clause 3 of the Memorandum are sometimes construed as merely incidental to the **main** objects of the company, which are ascertained from the first few paragraphs of clause 3, read in conjunction with the name of the company (b).

Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd., [1902] 1 Ch. 745

The Memorandum (clause 2) authorised the company to acquire gold mines "in Mysore and elsewhere," and contained wide general clauses:—**Held**, that the company **could not** purchase an option with a view to forming a new company to work mines on the Gold Coast.

In order to avoid this narrow construction adopted by the Courts, the Memorandum of Association is usually now framed so as to state all the possible things that the company may wish to do as independent main objects of the company (see p. 18), and, if this is clearly the intention of the document, the Courts will construe it in this manner.

Cotman v. Brougham, [1918] A. C. 514

An oil company underwrote shares in a rubber company. The Memorandum contained, as one of the objects, subscribing for shares of other companies, and it was expressly stated that each of the objects was to be considered as a separate and independent main object of the company.—**Held**, the underwriting was not *ultra vires*.

If the **main object** is gone, the company may be wound up.

(b) *Re Crown Bank* (1890), 44 Ch. D. 634.

Re Amalgamated Syndicate, [1897] 2 Ch. 600

The company was formed to erect stands and let out seats for the Diamond Jubilee. The Memorandum also contained power (d) to carry on all kinds of promotion business, and (e) to act as house agents. There was a heavy loss. After the Jubilee, the directors proposed to carry on business under clauses (d) and (e):—**Held**, the company should be wound up, its **substratum** or **main object** having gone. VAUGHAN WILLIAMS, J.: "I ought not to read these clauses as defining a succession of objects different from the main object, but . . . as general powers merely providing for the execution by the company of matters which are only incidental to its main objects."

The principle of construction laid down in *Cotman v. Brougham* (*ante*, p. 27) also applies when deciding whether the substratum has gone (c).

The objects of a company **must not be illegal** (d), *e.g.* to carry on a lottery, or to do something forbidden by the Companies Act, such as buying its own shares (see p. 71), or increasing the liability of its members (see s. 22).

A power given in the Memorandum to sell the whole of its undertaking for shares (as in clause (i) in the form on p. 17) does not enable the company to force its shareholders to subscribe further money by taking shares not fully paid in a new company (e).

The powers of a company may be altered or extended

A company may alter or extend its memorandum by special resolution if the alteration is required to enable the company—

(c) *Re Kitson & Co., Ltd.*, [1946] 1 All E.R. 435. The case of *Stephens v. Mysore Reefs (Kargundy) Mining Co., Ltd.* (above) probably went too far in extending this principle to the construction of a Memorandum on a question of *ultra vires*.

(d) Or blasphemous (*Bowman v. Secular Society, Ltd.*, [1917] A. C. 406).

(e) *Bisgood v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743, at p. 757.

- (a) to carry on its business more economically or more efficiently ; or
- (b) to attain its main purpose by new or improved means ; or
- (c) to enlarge or change the local area of its operations ; or
- (d) to carry on some other business which may be conveniently combined with its own ; or
- (e) to restrict or abandon any of its objects (f) ; or
- (f) to sell its undertaking ; or
- (g) to amalgamate with another company (g).

Before 1948 this alteration could only be done by special resolution confirmed by the Court ; but s. 5 of the Act now makes confirmation by the Court unnecessary unless an application is made to the Court to cancel the alteration by the holders of at least 15 per cent. in nominal value of the company's issued share capital or any class thereof, or by the holder of not less than 15 per cent. of the company's debentures. The application must be made within 21 days after the passing of the resolution. The Court may confirm the alteration on such terms as it thinks fit or may adjourn the application for arrangements to be made for the purchase of the interests of dissentients ; or it may, no doubt, refuse to confirm it.

No alteration can be made requiring a member to take up further shares or otherwise increasing his liability (h).

The Court would not allow entirely new powers to be acquired which were incompatible with the original objects of the Company.

(f) *Jewish Colonial Trust (Juedische Colonial Bank), Ltd.*, [1908] 2 Ch. 287, and see *New Westminster Brewery Co. Ltd.*, [1911] W.N. 247.

(g) Companies Act, s. 5. This extends to a friendly Society which has been converted into a Limited Company. Companies (Converted Societies) Act, 1910, 10 Ed. vii. and 1 Geo. v., c 23.

(h) Companies Act, s. 22.

Re Cyclists' Touring Club, [1907] 1 Ch. 269

The company was registered without the word "limited" (see pp. 20, 21). The Memorandum stated that the objects were "to promote, assist, and protect the use of bicycles, tri-cycles, and other similar vehicles on the public roads." The company proposed to alter its powers by admitting all tourists, including motorists:—**Held**, the alteration must not be allowed, as it did not fall within clause (a) to (e) of the section: especially as one of the objects of the company was to protect cyclists against motorists.

Sometimes the Court before approving an extension of objects, would require an alteration in the name of the company (*i*), but would not do so if such an alteration would be very inconvenient (*h*).

It is no objection that the additional powers alter the objects in a fundamental manner, provided the alteration will enable the Company to carry out its main objects more efficiently (*n*).

Re Indian Mechanical Gold Extracting Co.,
[1891] 3 Ch. 538

The Company had power to work certain patents in India only. The Court sanctioned an alteration of the Memorandum by removing this restriction; but made it a condition that the name of the Company should be altered (*l*).

Or the Court might impose conditions.

A company governed by a deed of settlement may adopt a Memorandum and articles in its place by the same procedure (*m*).

(*i*) *Indian Mechanical Gold Extracting Co.*, below.

(*h*) *Trust and Agency Co. of Australasia, Ltd.*, [1908] W. N. 229.

(*l*) See also *Re Westminster Brewery Co., Ltd.*, [1911] W. N. 247, where a very short form of memorandum was expanded by substituting a long memorandum with numerous objects in common form.

(*m*) Companies Acts, 395.

(*n*) *Re Scientific Poultry Breeders' Association, Ltd.*, [1933] Ch. 227.

SECTION 4

Clause IV.—The Limitation of Liability

A statement that the liability of members is limited (as in the form on p. 18) without more, means "limited by shares"—that is, that no member can be called upon to pay more than the nominal amount of his shares, or so much thereof as remains unpaid; and, if his shares be fully paid up, his liability is nil.

Exception. If a company carries on business for more than six months after the number of its members has been reduced below seven (or two in case of a private company) every member who knows this fact is liable to pay all the debts contracted during that time (o).

A company may be limited by guarantee. Then clause 5 will run, "Every member of the company undertakes to contribute to the assets of the company . . . for payment of the debts . . . etc. . . . such amount as may be required, not exceeding £ . . ."

This form of company is not so common as the former, and is dealt with on p. 256.

In the case of a banking company which issues notes, the liability of its members on the notes is unlimited (p).

SECTION 5 .

Clause V.—The Capital Clause

This clause must state the amount of the nominal capital of the company and the number and amount of the shares (q). See clause 5 of the form on p. 18.

There is no legal limit to the amount of capital or of each share: some companies have a capital of only £7, while the capital of others may be £100,000,000 or more

(o) Companies Act, s. 31.

(p) Companies Act, s. 431.

(q) Companies Act, s. 2.

The shares may be 1s. each or £5000, or any other amount.

The amount of capital is determined by the cost of starting the business, and the amount required for working it when started.

Thus, suppose the business and goodwill are to be purchased by the company for £200,000 in cash and £100,000 in shares, and £100,000 is needed for working capital.

Allowing £50,000 for emergencies, the amount of **cash** required to be raised would be £350,000. £150,000 of this may be borrowed by the issue of **debentures**, say 1,500 debentures of £100 each. This will leave £200,000 to be subscribed in cash, besides the £100,000 worth of shares for the vendors of the business.

The capital of the company will then be £300,000 divided into (say) 1,000 five per cent. preference shares of £100 each, and 200,000 ordinary shares of £1 each.

(*Note*.—Money borrowed on debentures is not “**capital**”).

The fact that there are different classes of shares need not be stated in the Memorandum, but may be provided for in the Articles.

Sometimes the rights of the preference shareholders are specified in the Memorandum so as to give them further security. These rights can then be made unalterable or only alterable in some specified manner (*r*).

The Memorandum sometimes gives express power to the company to alter these rights, provided the alteration is sanctioned by resolutions passed at separate meetings of the holders of the classes of shares affected by the alteration.

(*r*) See *post*, p. 117

Other provisions are sometimes inserted in the Memorandum, which could have been put in the articles. If so, these provisions can be altered by special resolution as on p. 29 (*rr*).

SECTION 6

Association Clause and Subscription.

See the clause at the end of the form on p. 18.

There must be at least seven persons (*s*), and they must subscribe for at least one share each.

The full name and description of each must be set out.

Any one may subscribe, even an infant (*Re Laxon & Co.*, [1892] 3 Ch. 555).

His contract to take shares is voidable but not void.

All the members may be foreigners. An English registered company can own a British ship though all its members are foreigners (*R. v. Arnaud* (1846), 9 Q. B. 806).

The signatures must be attested by a witness ; but one witness to all the signatures is sufficient.

The duties of the subscribers are—

- (1) to pay for the shares for which they have subscribed ;
- (2) to sign the Articles of Association ;
- (3) to appoint the first directors ; and
- (4) usually to act as directors until such appointment (*t*).

(*rr*) Companies Act, s. 23 (2).

(*s*) Except in the case of a private company, see Chapter XVIII.

(*t*) This depends on the Articles.

CHAPTER V

ARTICLES OF ASSOCIATION

Form

THE form usually deals with the same matters as are dealt with in Table A (see p. 363, *post*).

The articles usually commence much as follows :—

THE COMPANIES ACT, 1948

Company limited by Shares

Articles of Association of Blank Company, Limited

1. *Definitions*.—"The Companies Act" means the Companies Act, 1948. "The Office" means the registered office of the Company.

It is no longer necessary to provide that the singular includes the plural or that "month" means "calendar month" (a).

2. *Table "A" not to apply*.—The regulations contained in Table "A" in the First Schedule to the Companies Act, shall not apply to the company (b).

3. *Preliminary contract*.—The company shall forthwith enter into an agreement in the form of a draft agreement between William Jones of the one part and

(a) Law of Property Act, 1925, s. 61.

(b) See *post*, p. 36.

this company of the other part, which has, for the purpose of identification, been initialled by three of the subscribers to the Memorandum of Association, and the directors shall carry the said agreement into effect with or without modification.

SHARES

4. *Capital*.—The capital of the company shall be divided into 5,000 preference shares of £1 each, and 20,000 ordinary shares of £1 each. The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of five per cent. per annum, and the right in a winding up of the company to any arrears of dividend and to repayment of capital in priority to all other shares, but no other rights in the capital or profits of the company.

5. The funds of the company shall not be employed in the purchase of or lent upon shares of the company, and the company shall not (except as authorised by s. 54 of the Companies Act, 1948) give any financial assistance for the purpose of or in connection with any purchase of shares in the company.

* * * *

The articles then usually set out a large number of clauses dealing with various matters, following for the most part the forms which now appear in Table A (see p. 363, *post*). Clauses 3 to 136 of Table A as set out in the appendix should here be referred to, as if they formed part of this Form.

Names, Addresses, and Descriptions
of Subscribers

John Jones, of	.
William Smith, of	.
Thomas Brown, of	.
Benjamin Green, of	.
Andrew Black, of	.
Arthur Drew, of	.
John Smith, of	.

Dated this 1st day of December, 1948.

Witness to all the above signatures,

GEORGE BROWNE.

The Company may adopt separate Articles, in which case the Articles must be printed and signed by the same persons as signed the Memorandum, with at least one witness, and stamped as a deed.

It is not, however, **necessary** to have separate Articles, except in case of a company limited by guarantee or unlimited (Companies Act, s. 6), and a private company, which must have Articles to limit the number of members, etc. (see p. 250, *post*). If the Company has no separate Articles, the form of Articles set out in the First Schedule to the Companies Act and called **Table A** applies, and becomes the Articles of the company. Table A may also be adopted in part, and other Articles added (*c*).

The **regulations** of a company are the Articles, together with any special resolutions passed by the company. That is to say, the regulations which the members are under a statutory covenant to observe.

(*c*) See Table A set out *post*, p. 363 *et seq.* The Interpretation Act, 1889, applies to Table A and any Articles added thereto *Fell v. Derby Leather Co., Ltd.*, [1931] 2 Ch. 252.

The Articles bind the company and the members thereof to the same extent as if they had been signed and sealed by each member and contained covenants by each member to observe them (*d*), and any new regulations are as binding as if they had been originally inserted in the Articles (*e*).

Result

- (1) Each member is bound to the company ;
- (2) Each member is bound to the other members ;

Borland's Trustee v. Steel Brothers & Co., Ltd., [1901] 1 Ch. 279

The Articles, as altered, provided that the shares of any member who became bankrupt should be sold to certain persons at a certain price. B. became bankrupt. His trustee claimed that he was not bound by the altered article :—**Held**, the Articles, as altered in the proper way, are a personal contract between B. and the rest of the members, and B. and his trustee are bound (*f*).

(3) Neither the company nor the members are bound to outsiders ;

Eley v. Positive Government Security Life Assurance Co. (1876), 1 Ex. D. 88

The Articles provided that E. should be employed as solicitor for the company. The company employed other solicitors. E. sued the company for breach of contract :—**Held**, there was no contract with E. and he could not sue.

The company is only bound to the members to a limited extent ; for the company is only bound " as if the members had signed," and the signature of the members cannot bind the company (*g*).

But the company may be liable on an implied contract in the terms of the Articles.

(*d*) Companies Act, s. 20.

(*e*) Companies Act, s. 10.

(*f*) And see *A. G. v. Jameson*, [1904] 2 I. R. 644.

(*g*) *Hickman v. Kent or Romney Marsh Sheepherders' Association*, [1915] 1 Ch. 881, at p. 897.

Re New British Iron Co., *Ex parte* Beckwith [1898]
1 Ch. 324

Article 62 provided that the remuneration of the directors should be an annual sum of £1,000. A director sued the company for his fees :—**Held**, “ the Article is not in itself a contract between the company and the directors : it is only part of the contract constituted by the Articles between the members of the company *inter se*. . . .

“ But where, on the footing of that Article, the directors are employed by the company and accept office, the terms of Article 62 are embodied in and form part of the contract between the company and the directors.”

The Articles are subject to the Memorandum, and cannot give powers which are not given by the Memorandum. But for purposes of construction, on points which need not necessarily be put in the Memorandum, they are to be read together, and the Articles may then explain or amplify the Memorandum (*h*).

The Articles must not contain anything illegal or ultra vires the company.

Any Article which is the same in substance as any Article in Table A, cannot be void as being illegal (*Lock v. Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461).

The Articles can be altered by the company, by a special resolution at a general meeting.

i.e. a resolution passed by a three-quarters majority of those voting at a meeting of which at least twenty-one days' notice has been given specifying the intention to propose the resolution “ as a special resolution ” (*i*).

The company may freely alter its articles, provided :

(1) **The altered articles do not contain anything illegal.**

(*h*) *Re Wedgwood Coal and Iron Co., Anderson's Case* (1877), 7 Ch. D. 75 ; *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349.

(*i*) Companies Act, s. 141.

(2) The alteration does not require a shareholder to subscribe for more shares or otherwise increase his liability (*k*).

(3) They do not go outside the powers given by the Memorandum.

It was at one time held (in *Hutton v. Scarborough Cliff Hotel Co. Ltd. B.* (1865), 2 Drew. & Sm. 521), that if the alteration altered the constitution of the company, it was void. But this was overruled in

Andrews v. Gas Meter Co., [1897] 1 Ch. 361

The Memorandum provided that the capital of the company should be £60,000 divided into 600 shares of £100 each. Power was given to increase the capital, but there was no power in the Memorandum or Articles to issue preference shares. The Company, by special resolution, altered its Articles so as to give itself power to issue preference shares, and issued them:—**Held**, the issue was good. If this had been **forbidden** by the Memorandum, it could not have been done: but as it was not, it was immaterial that the change quite altered the composition of the company.

And (4). The alteration does not constitute a fraud on the minority.

Thus, if there were 1,000 shares of £1 each, ranking equally as to dividend, a resolution that shares numbered 1 to 800 should carry three times as much dividend as the others, would be bad.

Menier v. Hooper's Telegraph Works

(1874), 9 Ch. App. 350

The majority of the members of Company A. were also members of Company B., and at a meeting of Company A. they passed a resolution to compromise an action against Company B. in a manner alleged to be favourable to B. but unfavourable to A.:—**Held**, the minority of Company A. can bring an action to have the compromise set aside (*l*).

(*k*) Companies Act, s. 22.

(*l*) And see *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506; and *Marshall's Valve Gear Co., Ltd., v. Manning, Warde & Co., Ltd.*, [1909] 1 Ch. 267; and cf. *Neale v. City of Birmingham Tramways Co.*, [1910] 2 Ch. 464.

The result appears to be that any change within the powers of the Memorandum will be allowed, subject to this limit, that the majority cannot alter the regulations so as to sacrifice the interests of the minority without a reasonable prospect of advantage to the company as a whole.

Brown v. British Abrasive Wheel Co., [1919] 1 C. 290

A large majority of the shareholders wished to buy up the minority with a view to extending the capital. The minority refused to sell, and the majority then passed special resolutions altering the Articles so as to enable nine-tenths of the shareholders to buy out any other shareholder. **Held**, the alteration of the Articles could be restrained (*m*).

Protection of Minority

The act of 1947 introduced new provisions for the protection of the persons holding a minority of the shares.

A member who complains that the affairs of the company are being conducted, not with a view to the interests of the whole body of members, but in a manner oppressive to some of them, including himself, may apply to the court by petition and, if the court is of opinion that the affairs of the company are being conducted as alleged and that a winding up would be unfair to those members, but that the facts would otherwise justify a winding up order, the court may make an order regulating the conduct of the company's affairs or for the purchase of the shares held by the petitioner by other members or by the company, (in which case the capital will be reduced).

(*m*) But see *Dafen Timplde Co., Ltd. v. Llanelly Steel Co.* (1907), *Ltd.*, [1920] 2 Ch. 124; *Shuttleworth v. Cox Brothers & Co. (Maidenhead), Ltd.*, [1927] 2 K. B. 9.

Where the Memorandum or Articles are altered by the order, further alterations inconsistent with the order cannot be made without leave of the court (n).

Where the capital is divided into different classes of shares (o) the Articles usually provide that the special rights of each class may be altered with the consent of a certain majority of the shareholders of that class. Where this is done and the rights are varied by the requisite majority vote, the holders of not less than 15 per cent. of the issued shares of the class affected may apply to the court to have the variation cancelled, and the variation does not take effect until it is confirmed by the court. The application must be made within 21 days after the resolution was passed (p).

Where this is not done, there is some doubt as to how far the company in general meeting can alter the rights of any class of shareholders, without the consent of that class. Every shareholder when he takes his shares is presumed to know that his rights may be altered by special resolution. On the other hand, the class of shareholders who form the majority could not alter the Articles simply for the purpose of depriving the smaller class of their rights.

e.g. if the capital were divided in 1,000 6 per cent. preference shares and 4,000 ordinary shares, the holders of the ordinary shares would not, except in very special circumstances, be allowed to reduce the preference dividend to 3 per cent. It would in such a case be extremely difficult for the ordinary shareholders to prove that such a reduction was necessary for the benefit of the company as a whole, and was not made for the purpose of benefiting themselves at the expense of the preference shareholders.

But an arrangement which benefits the company may be allowed, even though it seriously affects the position of individual shareholders.

(n) Companies Act, s. 210, re-enacting s. 9 of the Act of 1947.

(o) See pp. 116, 117, *post*.

(p) Companies Act, s. 72.

Allen v. Gold Reefs of West Africa, Limited, [1900]
1 Ch. 656

The Articles gave the company a lien on all shares "not fully paid up," for calls due to the company. A. was the only holder of fully paid shares; he also owed money to the company for calls due on other shares. A. died. The company altered its Articles by striking out the words "not fully paid up," and thus gave itself a lien over all A.'s shares :—**Held**, this was good. The power must be exercised for the benefit of the company as a whole. "I can see no reason for judicially putting any other limit on the power"; LINDLEY, M.R.

The majority may even take power to exclude the minority where this is done *bona fide* for the benefit of the company.

Sidebottom v. Kershaw, Leese & Co., [1920] 1 Ch. 154

The articles were altered so as to enable the directors to require any shareholder *who was competing with the company* to transfer his shares at their full value. **Held**, this alteration was valid.

A company cannot deprive itself of its powers to alter its regulations (*Andrews v. Gas Meter Co.*, see p. 39).

And it cannot by altering its articles justify a breach of contract with third parties.

i.e. a company cannot avoid its liabilities under a contract made with persons who are not members of the company by altering its Articles (*q*). In such a case, the company cannot be prevented from altering its articles, though this may give rise to a claim by the other party to damages for breach of contract (*r*).

An alteration not made in the proper way is not complete, but may have some effect.

(*q*) *British Equitable Assurance Co., Ltd. v. Baily*, [1906] A. C. 35, at p. 36.

(*r*) *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506, *Southern Foundries (1926) Ltd., v. Shirlaw*, [1940] A. C. 701; [1940] 2 All E.R. 445.

Muirhead v. Forth and North Sea Steamboat Mutual Insurance Association, [1894] A. C. 72

An insurance company purported to alter its Articles by adding that every policy should contain a certain clause. The alteration was not properly made, but the new Article was indorsed on every policy, which was made "subject to the Articles":—**Held**, a policy holder was bound by the Article.

The Memorandum and Articles are registered with the Registrar at Bush House (s), and may be inspected by **any one** on payment of a small fee (t). **Members** of the company are entitled to have a copy sent to them. The company may charge 1s. for the copy (u).

The result of this publicity is that any one who deals with the company is deemed to have notice of the contents of the Memorandum and Articles, and therefore of the powers of the company and the directors; and if any one deals with the company in matters which are inconsistent with the powers so given, he must take the consequences.

But so long as the act done is not inconsistent with the Memorandum and Articles, **an outsider is not** bound to inquire whether all the necessary steps have **been taken**. That is, he is entitled to assume that the directors have acted properly.

This is called **the Rule in the Royal British Bank v. Turquand** (1856), 6 E. & B. 327.

The directors issued a bond to A.—they had power to issue bonds **if authorised by general resolution of the Company**. It was claimed that no resolution had been passed:—**Held**, A. could sue on the bond. He was entitled to assume that a resolution had been passed, even if it had not been passed (which was not decided).

(s) Companies Act, s. 12. See p. 23 *ante*, note (r).

(t) *Ibid.*, s. 426 and to have copies at 6d. per folio.

(u) *Ibid.*, s. 24.

"Persons dealing with the company are bound to read the registered documents, and to see that the proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of the internal proceedings."

Duck v. Tower Galvanizing Co., Ltd., [1901] 2 K. B. 314

R., who had business assets of the value of £100, and debts of the same amount, formed his business into a company. R. continued to carry on the whole business of the company, and without any meeting issued debentures to D. for £500 under the seal of the company. The regulations gave power to issue debentures:—Held, D. was entitled to assume that the debentures were valid, and he thus had priority over the other creditors (*v*).

But if the person dealing with the company has notice of the irregularity, he is affected by it (*w*); and if an officer of the company acts in a matter which would not ordinarily be within the province of such an officer, the company is not bound by his acts merely because the articles contained a power (which was not in fact exercised) enabling the directors to delegate any of their powers, particularly if the third party had not read or relied upon the article (*x*).

A director of the company cannot rely on this rule, even if he has only just been appointed director when shares are invalidly allotted to him (*y*).

(*v*) See also *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77 (where it was held that the company was bound by a bill of exchange drawn by its managing director, though he had not in fact authority to draw the bill).

(*w*) *Howard v. Patent Ivory Manufacturing Co., Re Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156, at pp. 170, 171.

(*x*) *Kreditbank Cassel G. m. b. H. v. Schenkers*, [1927] 1 K. B. 826; *Houghton & Co. v. Nothard, Lowe and Wills*, [1928] A. C. 1; *British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd.*, [1932] 2 K. B. 176.

(*y*) *Morris v. Kanssen*, [1946] A. C. 459; [1946] 1 All E.R. 586.

CHAPTER VI

THE PROMOTER AND THE PROSPECTUS

SECTION I

The Promoter

"THE term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is brought into existence" (a).

A **promoter** is "one who undertakes to form a company with reference to a given object, and to set it going, and who takes the necessary steps to accomplish that purpose" (b). He is not a trustee or agent for the company, for it has not yet come into existence; but he stands in a fiduciary relation towards it and is liable to refund secret profits, etc., in the same way as a director.

If, therefore, the promoter wishes to sell his own property to the company, he should either (i) see that there is a board of independent persons appointed as directors of the new company or (ii) disclose all the facts to the intended members, or to the public by means of a prospectus.

A promoter cannot relieve himself of this liability by provisions to that effect in the Articles of the company (c).

(a) *Whaley Bridge Calico Printing Co. v. Green* (1880), 5 Q. B. D. 109.

(b) *Twyecross v. Grant* (1877), 2 C. P. D. 469.

(c) *Omnium Electric Palaces, Ltd. v. Baines*, [1914] 1 Ch. 332, at p. 347.

If he acquires property after he has taken up the position of a promoter for a company, the facts may show that he acquired it as a trustee for the company, but apart from such facts, he may sell it to the company at a profit, provided he makes the proper disclosure (c).

SECTION 2

The Prospectus

Duty to disclose facts

A **prospectus** is usually a circular published by the promoters after the formation of the company to induce the public to take shares in the company. It is defined in the Companies Act as "any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company" (d).

The object of a promoter in issuing a prospectus is to make it as attractive as possible.

The object of the legislature is to prevent the public from being misled and defrauded.

The promoter must take great care—

1. Not to make any untrue or misleading statements, because—

- (a) an allotment of shares may be set aside for fraud or misrepresentation; and
- (b) he may be sued for damages for fraud; and
- (c) he may be sued for compensation for misrepresentations under s. 43 of the Companies Act.

2. To disclose all matters which he is bound to disclose by the Companies Act.

(d) Companies Act, s. 455. As to what is an issue to the public, see p. 251.

As to 1. Untrue statements.

(a).—Rescission for fraud or misrepresentation.

Fraud.—A contract to take shares is governed by the same rules as other contracts, and therefore any person induced by fraud to take shares may rescind the contract, and have his name struck off the register. But he cannot both retain the shares and get damages (*e*).

Misrepresentation.—Any person who takes shares on the faith of statements of fact contained in a prospectus may set aside the contract and apply to be struck off the register if those statements are false, even though they were made innocently.

But he must apply—

- (1) within a reasonable time ; and
- (2) before proceedings to wind up the company have been commenced.

The misrepresentation need not be the **sole** reason which induced the applicant to apply for shares, if he really acted upon the misrepresentation (*Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459).

Statements of **opinion** or exaggerated views of the advantages of a company are not enough to upset a contract to take shares.

But if, taking the whole prospectus together, there was really a misrepresentation of fact, the contract may be set aside, though each statement by itself is literally true.

(*e*) *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317.

Greenwood v. Leather Shod Wheel Co.,
[1900] 1 Ch. 421

The prospectus stated in large type, "orders have already been received from the House of Commons," and "wheels for the trolleys in the House of Commons have been ordered, and are now in use."

In fact, the person who supplied refreshments to the House had **one** trolley with these wheels, but not ordered by the House of Commons:—**Held**, the prospectus was fraudulent and the contract void.

The prospectus is often based upon the report of an expert who has examined the property. If this report contains false statements of fact, a shareholder who relies on them may rescind his contract to take shares, if the directors have invited subscriptions for shares on the faith of the statements in the report, unless the directors have clearly warned the public that they do not vouch for the accuracy of the report (*f*).

Where a prospectus includes a statement by an expert, it must not be issued unless the expert has given his consent to the issue of the prospectus with the statement included in the form and context in which it is included. A statement that he has given and not withdrawn his consent must also appear in the prospectus. (*g*).

The expert is, in certain circumstances liable to pay compensation under s. 43 of the Companies Act in respect of untrue statements purporting to be made by him as an expert (*h*).

Concealment in a prospectus may amount to fraud, but only if it is such a concealment as implies a falsehood.

(*f*) *Mair v. Rio Grande Rubber Estates*, [1913] A. C. 853, at p. 872. *Re Pacaya Rubber and Produce Co., Ltd., Burns' Application*, [1914] 1 Ch. 542. *Re Reese River Silver Mining Co., Smith's Case* (1867), 2 Ch. App. 604.

(*g*) Companies Act, s. 40.

(*h*) Companies Act, s. 43 (3).

R. v. Kylsant (Lord), [1932] 1 K. B. 442

A prospectus offering debentures for subscription stated that "the annual balance available . . . after providing for depreciation and interest on existing debenture stocks has been sufficient to pay interest on the present issue more than five times over," and "after providing for all taxation, depreciation of the fleet, etc. . . the dividends on the ordinary stock during the last seventeen years have been as follows":

Every statement in the prospectus was literally true; but the prospectus did not disclose that the profits had been made in the years 1918 to 1920, and that there had been losses in every year from 1921 to 1927.

Held, the prospectus was "false in a material particular" in that it conveyed a false impression (i).

It is now expressly provided that a statement in a prospectus is to be deemed to be untrue if it is misleading in the form and context in which it is included (k).

(b) Damages for fraud.

In *Derry v. Peek* (1889), 14 App. Cas. 337, it was held that a director was not liable in damages for false statements in a prospectus if he honestly believed them to be true, even though there was **no reasonable ground for his belief**; for the common law action of deceit will not lie unless "a man makes a statement to be acted upon by others, which is false, and which is **known by him to be false or is made by him recklessly or without care whether it is true or false**" (see p. 350 of the report).

Where fraudulent statements are made, only **persons who were intended to act upon the representations** can recover damages.

In *Peek v. Gurney* (1873), L. R. 6 H. L. 377, it was heldⁱ that the directors were not liable for false

(i) See also *Peek v. Gurney* (1873), L. R. 6 H. L. 377, at p. 403. *Re Christineville Rubber Estates, Ltd.* [1911] W. N. 216.

(k) Companies Act, s. 46 (a).

statements in a prospectus to a person who had bought shares in the market, because the prospectus was only addressed to the original allottees, and not to subsequent purchasers of the shares.

Collins v. Associated Greyhound Racecourses, Ltd.
[1930] 1 Ch. 1.

The plaintiff applied for shares in the name of nominees, and shares were allotted to them. The nominees renounced the allotment in favour of the plaintiff. **Held**, the plaintiff could not recover, since he could not show that the Company knew that he had taken up the shares on the faith of the prospectus.

In addition to their possible liability for fraud at Common Law, directors and promoters are subject to special liability to pay compensation under s. 43 of the Companies Act.

(c) Compensation under section 43.

A director or promoter is liable to compensate any persons who subscribe for shares on the faith of a prospectus for damage sustained by reason of any untrue statement in it, unless—

- (i) he had reasonable grounds for believing it to be true; or
- (ii) he made the statement upon the authority of an expert whom he had reasonable grounds for believing to be competent (i); or
- (iii) the statement was a correct copy of an official document.

If a director dies, no action under this section can be brought against his personal representatives unless proceedings were pending against him at the date of his death or the cause of action arose not earlier than six

(i) Directors are not entitled to rely on the statements of the vendor as an expert, *Adams v. Thrift*, [1915] 1 Ch. 557; affirmed by C. A., [1915] 2 Ch. 21.

months before his death and proceedings are taken not later than six months after his personal representatives took out representation (*m*).

N.B.—A shareholder can often obtain rescission of his contract to take shares in cases where he cannot make the directors liable for damages or compensation.

As to 2.—Matters which must be disclosed.

These are now contained in s. 38 and the 4th Schedule of the Companies Act.

The abuses intended to be remedied by the legislature were—

1. Material facts were frequently suppressed.
2. The directors often had no stake at all in the company.
3. Many companies proceeded to business, even if only a few of the shares had been taken up, and the company failed for want of sufficient capital.
4. Much of the money subscribed went to pay purchase money inflated by profits of some syndicate who sold the property to the promoters.

The legislature has attempted to remedy these abuses by the following provisions —

If the company issues a prospectus, then the prospectus must be dated, a copy must be signed by every director or proposed director (*n*), and delivered to the registrar for registration and the prospectus must state on the face of it that a copy has been so delivered.

(*m*) Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 1. *Geipel v. Peach*, [1917] 2 Ch. 108.

(*n*) Companies Act, ss. 37 & 41.

The prospectus must state (o)

- * (1) The number of "founders" or deferred shares (if any).
- * (2) The number of shares (if any) fixed by the Articles as the qualification of a director and the remuneration of the directors.
- * (3) Names, descriptions, and addresses of directors or proposed directors.
- (4) Where shares are offered to the public, the "minimum subscription," *i.e.*—
 - (i) the minimum amount which in the opinion of the directors must be raised by the issue to provide for the purchase price of any property to be acquired, preliminary expenses, underwriting commissions, repayment of money borrowed for these purposes and working capital; and
 - (ii) the amounts to be provided from other sources for these purposes.
- (5) The time of the opening of the subscription lists.
- (6) The amount payable on application and allotment on each share, and in case of a second or subsequent offer of shares, the amount offered on each previous allotment within the past two years and the amount allotted and the amount paid on the shares allotted (p).
- (7) Particulars of any options to subscribe for shares, including the time for exercise, the price to be paid and the consideration given for the option, and the persons entitled to the option.
- (8) The number of shares or debentures issued as fully or partly paid up otherwise than in cash."

(o) *Ibid.*, s. 38 and 4th Schedule. (The Act of 1929 required the contents of the memorandum with the names etc. of the signatories to be set out. This is no longer necessary.)

(p) Default in disclosing the amount of previous allotments does not entitle an allottee to rescind his contract. *Re South of England Natural Gas and Petroleum Co., Ltd.*, [1911] 1 Ch. 573.

- (9) **The names and addresses of the vendors** of any property acquired or to be acquired by the company which is to be paid for wholly or partly out of the proceeds of the issue or the acquisition of which has not been completed at the date of the issue of the prospectus and the amounts payable to each vendor and particulars of any transaction relating to that property completed within the preceding two years in which any vendor, promoter or director had any interest.
- (10) **The amount of the purchase money, specifying the amount paid for goodwill.**
- (11) **The amount of the underwriting commission post (if any).** (See p. 186 *post*).
- * (12) **An estimate of the preliminary expenses and of the expenses of the issue and the persons by whom they are paid or are payable.**
- (13) **Any amount or benefit paid or given to any promoter, and the consideration for such payment and any other benefit given within the preceding two years or intended to be given to any promoter.**
- (14) **The date of and parties to any material contract and the general nature of all such contracts, but not if made—**
 - (1) in the ordinary course of the company's business; or
 - (2) more than two years before the issue of the prospectus.
- (15) **Names and addresses of the auditors (if any).**
- * (16) **The interest of every director or promoter in the promotion of or the property to be acquired by the company, and any sums paid to him to induce him to become or to qualify him as a director.**
- (17) **Where the shares are of more than one class, the rights of voting and the rights as to capital and dividend attached to the several classes of shares.**

- (18) Where the business has been carried on for less than three years, the time during which it has been carried on.

The prospectus must also set out—

- (1) A report of the auditors as to the assets and liabilities of the company at the last date to which the accounts were made up, the profits of the company and the rates of dividends declared in each of the five years preceding the prospectus (if the business has been carried on so long), and the rates of dividend paid on all classes of shares for the same period.
- (2) A report by named accountants as to the profits during the same period of any business intended to be acquired.

The auditor's report, besides dealing with the company's profits or losses, must deal with the profits or losses of its subsidiaries and must deal as a whole with the assets and liabilities of the company and its subsidiaries; and further details must be given if any of the proceeds of the issue are to be applied so as to make the company a controlling company.

The requirements of this schedule are set out in full in the appendix.

If a prospectus is issued more than two years after the company is entitled to commence business, none of the provisions marked * on pp. 52, 53 apply, and none of the provisions of section 38 apply in the case of shares or debentures which are to be in all respects uniform with shares or debentures previously issued and dealt in or quoted on a recognised Stock Exchange.

Any condition binding the applicant to waive the provisions of this section is void (q).

(q) Companies Act, s. 38 (2).

These requirements apply to every prospectus "issued" by or on behalf of a company or any person interested in the formation of a company.

"Issued" means shown to some persons (or possibly only one person) as members of the public for the purpose of inviting them to subscribe for shares on the terms of the prospectus (see *Nash v. Lynde*, below.)

If the requirements of section 38 are not complied with, the omission may amount to a misrepresentation (see p. 47, *ante*), entitling the subscriber to obtain rescission of his contract to take shares; if not, the remedy for failure to comply with this section is not rescission (a), but possibly damages against the directors or other persons responsible for the prospectus.

Nash v. Lynde, [1929] A. C. 158

The directors of a private company prepared a document, which was in form an offer of shares to persons generally, and the jury found that it was "an offer of shares made to the public" (see p. 46). The document was not, however, advertised, but was shown to one person with a view to his joining the company and becoming a director.

The document omitted to state the number of shares allotted for a consideration other than cash.

Held, by the Court of Appeal (1) that the document was a prospectus which had been issued; (2) that the directors were liable in damages (£2,000).

Held, by the House of Lords as to (1) that the document had never been "issued" as a prospectus.

As to (2) that this point did not arise, and the decision of the Court of Appeal must not be taken to be affirmed.

It should be noted that the Act does not say that the directors will be liable; but this seems to be implied from the fact that the Act provides as follows:—

A director is not liable if—

(1) he did not know of the matter not disclosed;

(a) *Re South of England Natural Gas and Petroleum Co., Ltd.*, [1911] 1 Ch. 573.

- (2) the non-compliance arose from an honest mistake of fact on his part ; or
- (3) the non-compliance was not material, and the Court thinks that he ought to be excused.

Before 1929 these requirements were sometimes evaded as follows: The company, instead of itself issuing the prospectus and obtaining subscriptions from the public, would allot the whole issue to a syndicate or company, called an "Issuing House." The Issuing House, then offered the shares for sale to the public by means of a prospectus. But, now, where a company allots shares or debentures with a view to their being offered for sale to the public, any document by which the offer to the public is made is to be deemed a prospectus issued by the company. (aa).

These provisions will *prima facie* apply whenever—

- (1) the prospectus is issued within six months after allotment ; or
- (2) the whole consideration for the allotment has not been received by the company.

Persons making the offer are to be liable as if they were directors, and the prospectus must also state—

- (a) the net amount received by the company for the shares and debentures allotted ;
- (b) a place and time at which the contract with the Issuing House can be inspected.

SECTION 3

Statement in Lieu of Prospectus

If the company does not issue a prospectus, the company must, at least three days before allotment, deliver to the registrar a "statement in lieu of

(aa) Companies Act, s. 45 re-enacting s. 38 of 1929.

prospectus " containing most of the information which would be required in the prospectus, in the form prescribed in the Fifth Schedule to the Companies Act (see Appendix C, p. 393) (b).

It must also set out the same reports as to the business proposed to be purchased and as to the business of any company which is to become its subsidiary as are required in case of a prospectus (c).

If the company fails to register a statement in lieu of prospectus, it cannot allot any shares or debentures. The allotment, if made, is voidable if the allottee applies within one month after the statutory meeting; or in cases where there is no such meeting, within one month after allotment.

The Companies Act is silent as to the effect of untrue statements in the statement in lieu of prospectus, but apparently—

(1) **If a person applying for shares inspects the statement in lieu of prospectus, the statement becomes the basis of the contract between him and the company, and if it contains a false statement, he may have a right to rescind (d).**

(2) A person who does not take his shares from the company, but buys on the market from the person to whom they were allotted, has no remedy against the company (e).

(3) A person who subscribes for shares on the faith of a statement in lieu of prospectus cannot claim compensation under s. 43 (f).

(b) Companies Act, s. 48. This does not apply to a private company.

(c) *Ibid.*, s. 48.

(d) *Re Blair Open Hearth Furnace Co., Ltd.*, [1914] 1 Ch. 390, at p. 401.

(e) *Peck v. Gurney* (1873), L. R. 6 H. L. 377 (cited p. 49, *ante*).

(f) See p. 50, *ante*.

(4) Any person who wilfully makes a false statement in a statement in lieu of prospectus is guilty of a criminal offence (g).

(5) All allotments of shares and debentures are not necessarily void merely because the contents of the statement are untrue or misleading (h).

SECTION 4

Effect of Disclosures Required

The effect of the disclosures required by the Act is shortly as follows :—

1. (i) **The number of founders or deferred shares.**
It is not now usual to create this class of shares. At one time such shares issued to the promoters and vendors were apt to deprive the ordinary shareholders of a large part of their reward in case the company was very successful.

2. The Qualification of the Directors.

This shows how far the directors are prepared to put faith in the company themselves.

It is usual to provide that no person shall be qualified to act as director unless he holds a certain number of shares.

These sections do not make it necessary for the company to fix any such qualification; but, if there is none, any person reading the prospectus can see that the directors have no personal interest at all in the success of the company.

By s. 181.—A person cannot be appointed a director of the company by its articles or named as such in the prospectus unless he has

(1) signed a consent to act, and

(g) Companies Act, ss. 30 and 438.

(h) *Re Blair Open Hearth Furnace Co., Ltd.*, [1914] 1 Ch. 390.

(i) The numbers refer to the clauses in the Fourth Schedule.
See p. 52 *ante*.

- (2) signed the Memorandum for or taken and paid for or agreed to pay for his qualification shares or signed a contract to take such shares **from the company** (*i.e.* not as a present from the promoters) ; or
- (3) made a statutory declaration to the effect that a number of shares sufficient for his qualification are registered in his name.

This does not apply to a private company, nor to a company which starts as a private company and then becomes a public company, and probably does not apply to a prospectus sent to existing shareholders or debenture holders only (*Burrows v. Matabele Gold Reefs and Estates Co., Ltd.*, [1901] 2 Ch. 23., at p. 27).

The result of non-compliance is not stated in the Act. Probably the appointment is void, and the person responsible has committed a misdemeanour and is liable in damages.

By s. 182.—**A director must take up his qualification shares within two months ;** and if he ceases to hold them, he vacates office.

3. Names and Addresses of Directors and Proposed Directors.

This is of course of great importance to the investors, and may have a decisive effect on the success of the undertaking, and of the issue.

4. The Minimum Subscription.

If the company proposes to **offer shares to the public** for subscription, the directors or promoters must determine before hand what is the minimum amount of capital with which they can provide for the matters set out in paragraph (4) (i) and (ii) on p. 52, *ante*. This is called the “**minimum subscription.**”

The amount of this minimum subscription must be stated in the prospectus (k).

Before 1929 promoters of companies who had failed to obtain the necessary capital from the public, frequently persisted in the formation of the company, and thus caused almost inevitable loss to the persons who had subscribed for shares.

But now, (l) no allotment is to be made unless the minimum subscription has been subscribed and the sum payable on application has been paid to and received by the company.

Cheques received by the company in good faith amount to payment, if the directors have no reason to suspect that they will not be paid (l).

If the minimum subscription has not been subscribed within 40 days after the issue of the prospectus, all money received from applicants must be repaid, and if it is not repaid within 48 days after the issue of the prospectus, the directors become liable to repay it with interest at 5 per cent., unless they can prove that the loss of the money was not due to their negligence or misconduct (l).

On any allotment of shares after the first allotment of shares offered to the public, the amount paid on application must not be less than five per cent., but the rest of this section does not apply.

This section does not apply to the allotment of debentures, or to a private company.

By s. 109.—**The company (if it has a share capital and has issued a prospectus) cannot commence business until (a) shares payable in cash up to the amount of the minimum subscription have been allotted, (b) every director has paid on every share, which he is liable to pay for in cash, the same amount as members of the public must pay on application and allotment, (c) no money is or may become liable**

(k) The prospectus is for the purpose the particular prospectus on which the applicant relies (*Roussell v. Burnham*, [1909] 1 Ch. 127).

(l) Companies Act, s. 47, re-enacting s. 39 of 1929.

to be repaid to applicants for any shares or debentures by reason of any failure to apply for or obtain permission for the shares or debentures to be dealt with on any Stock Exchange (see p. 89, *post*), (d) a statutory declaration has been made to this effect.

If there is no prospectus, there will be no minimum subscription, but a statement in lieu of prospectus must be registered if the Company has a share capital, and the directors must pay the amounts due on application and allotment (as above) and a statutory declaration must be made.

Contracts made by the company before it has become entitled to commence business are provisional only, and do not become binding **on the Company** (*m*) until it has become entitled to do so.

This includes preliminary contracts which have been adopted by the company; and probably even the contract of the signatories of the Memorandum to take shares in the company is void if the company never obtains the minimum subscription (*Re Otto Electrical Manufacturing Co.* (1905), *Ltd.*, *Jenkins' Claim*, [1906] 2 Ch. 390).

5. The time of the opening of the subscription list.

No allotment must be made until the beginning of the third day after the date of the first issue of the prospectus. The beginning of this third day is known as the time of the opening of the subscription lists, and an application for shares is not revocable until the expiration of the third day after the time of the opening of the subscription list (*mm*).

8. Shares and debentures issued for a consideration other than cash (see pp. 76 and 77).

(*m*) *Ibid.*, s. 109 (4). These words seem to imply that the contract is binding on the parties other than the company.

(*mm*) Companies Act, s. 50 and see p. 89, *post*.

9. The names of the vendors and the amounts payable to them, and the interests of directors or promoters in the property to be purchased.

This requirement does not now apply where the contract for the purchase of the property in question was entered into in the ordinary course of the Company's business and was not connected with the intended issue or where the amount of the purchase money is immaterial (n).

The purchase money paid to each vendor must be disclosed in the prospectus whether he sells directly to the company or sells to other persons who sell to the company. In the latter case the purchase money paid to each vendor must be shown.

A person is a vendor under this section if he has entered into any contract, absolute or conditional, to sell or buy or for an option to buy any property to be acquired by the Company, and

- (a) the purchase money is not fully paid when the prospectus is issued ;
- or (b) the purchase money is payable wholly or partly out of the proceeds of the issue of shares offered by the prospectus ;
- or (c) the contract depends on the result of that issue (o).

Brookes v. Hansen, [1906] 2 Ch. 129

In May, 1901, Wheeler agreed to sell certain patent rights to a syndicate for £15,000. This sum was paid to Wheeler before the end of May. On June 1st, 1901, the syndicate agreed to sell the patents to a company for £58,500 and the company issued a prospectus on the same day which did not refer to the contract between Wheeler and the syndicate :—**Held**, Wheeler was not a vendor, and this contract need not be set out (oo).

(n) Sched. IV Part I.9 (2) (a) (b).

(o) Sched. IV. Part III. 23.

(oo) Note that this transaction, having taken place within 2 years, would now require to be disclosed under clause 9.

Held also, that if the £15,000 had not been paid to Wheeler before June 1st, 1901, and the company had agreed to buy from the syndicate the **benefit of its contract** with Wheeler, then Wheeler would have been a vendor. The test seems to be whether any of the cash paid by the company is paid to the original vendor or not.

10. The amount of the purchase money, specifying the amount paid for goodwill.

It is very difficult to determine the value of the goodwill of a business, and large sums are often paid for goodwill which are soon afterwards written off as having been entirely lost.

11. Underwriting Commission.

This clause only requires the amount or rate of commission to be stated. The dates of and parties to the underwriting contracts are also required under Clause (14), and if any director is interested in the underwriting, this should be disclosed under Clause (16).

Where the underwriting is undertaken by a company or syndicate, the Act does not require the capital of the syndicate to be stated. In several cases the promoters or their friends have formed a syndicate with a capital so small that it could not possibly pay for the shares it agrees to underwrite, and consequently, if a large number of the shares are not taken up, the syndicate cannot pay the calls and the underwriting becomes a farce. Directors of a company should therefore insist that any syndicate which underwrites the shares must have a sufficient subscribed capital. If it has not, they may be liable for negligence.

It is not necessary to disclose the commission paid to sub-underwriters.

See generally as to underwriting, Chapter XIII.

12. An estimate of the preliminary expenses and the expenses of the issue.

These expenses include the stamps payable on the formation of the company, legal costs and other expenses connected with the preparation of the Memorandum and Articles and other documents and advertising the prospectus and underwriting.

13. The amount paid to any promoter.

As to promoters, see. p. 45.

14. The dates of and parties to and the general nature of every material contract.

Under the Act of 1929, the prospectus had to state a time and place where these contracts could be inspected. Very few people took advantage of this provision, and it is not now necessary, but a summary of the effect of each contract is to be stated instead (*p*), and a copy of the contract must be annexed to the copy of the prospectus delivered to the registrar (*pp*).

A somewhat similar provision was contained in the Companies Act, 1867, s. 38, and was interpreted to include all contracts which imposed any obligation on the company, or which were entered into by promoters (or persons who afterwards became promoters) relating to the affairs of the company, and which were material for an intending shareholder to know.

Gluckstein v. Barnes, [1900] A. C. 240

The old "Olympia" Company was in difficulties, and the debentures were worth very little. X., Y. and Z., as trustees for a syndicate, bought up a great number of debentures very cheap. Then they bought "Olympia" for £140,000, and sold to a new company for £180,000. The result of this was, that the debentures were paid in full out of the £140,000, and X., Y. and Z. made a profit on the debentures of £20,000.

X., Y. and Z. became directors of the new company. They disclosed their profit of £40,000, but not their profit of £20,000 :—**Held**, there was not sufficient disclosure, and X., Y. and Z. must pay the £20,000 to the company.

(*p*) Companies Act, Sched. IV. Part I. 14.

(*pp*) *Ibid.*, s. 41.

If any contract required to be disclosed by the Act (*q*) is not disclosed, any person who has taken shares on the faith of the prospectus can claim damages from the directors who issued it; but only if he can show—

- (1) that the undisclosed contract was a material one; and
- (2) that he has suffered damage by its non-disclosure (*r*).

15. The names and addresses of the auditors.

It is the business of the auditors to check the accounts of the company and report to the shareholders (see p. 244, *post*); it is therefore important that they should be reliable persons.

16. The interest of every director in the promotion of or in the property proposed to be acquired by the Company.

If the director is a member of a firm, any such interest acquired by the firm must be disclosed.

17. Rights of voting at meetings and other rights attached to various classes of shares.

The Act of 1908 only required the voting rights to be disclosed.

A “waiver clause” was sometimes used to defeat the provisions of some of the earlier Acts. A clause was inserted in the prospectus that applicants should waive the provisions of the section; but this “waiver clause” had to be straightforward and clear. If so, it was good and effectual to cover *bona fide* slips (*s*). If it was “tricky” it was void.

(*q*) *Re Wimbledon Olympia, Ltd.*, [1910] 1 Ch. 630.

(*r*) *Nash v. Calthorpe*, [1905] 2 Ch. 237. And see *Macleay v. Tait*, [1906] A. C. 24; and *Marshall v. Morrison*, [1907] W. N. 29.

(*s*) *Macleay v. Tait*, [1906] A. C. 24

Greenwood v. Leather Shod Wheel Co., [1900] 1 Ch. 421

The same prospectus as is mentioned on p. 48, contained the clause: "There may be contracts which perhaps ought to be referred to" . . . "any subscriber shall be deemed to have waived all rights to further particulars of these contracts":—**Held**, "the waiver clause is clearly tricky and fraudulent. It is printed in small type so as to escape attention. It is worded so as to conceal and not to afford notice of the contract of December 3rd to which the promoter was a party." The clause was void (†).

All such waiver clauses are now void (‡).

Before 1929 an "abridged prospectus" was often advertised in newspapers, accompanied by a form of application for shares. This is now prohibited. S. 38 (3) provides that it shall not be lawful to issue a form of application for shares or debentures unless it is accompanied by a full prospectus complying with the Act.

This does not apply to underwriters or to shares not offered to the public.

In any case, it is probable that such an "abridged prospectus" is really a "prospectus" within the meaning of the Act, and any provisions framed with a view to preventing this result are probably void as waiver clauses under section 38 (2).

If, therefore, the applicant reads and relies upon the abridged prospectus and does not read the full prospectus, there would be a considerable risk of his being able to recover from the directors any damage he has suffered (v).

By a new provision made by s. 60 of the Act of 1947, when a prospectus states that application has been or will be made for the shares or debentures to be dealt in on any Stock Exchange, any allotment is to be void if (1) permission has not been applied for before the third day after the first issue of the prospectus, or (2) if permission is refused before the expiration of three weeks from the date of the closing

(†) And see *Watts v. Bucknall*, [1903] 1 Ch. 766.

(‡) Companies Act, s. 38 (2).

(v) *Rousell v. Burnham*, [1909] 1 Ch. 127; *Army, Navy and Civil Service Co-operative Society of India, Ltd. v. Craig* (1892), 8 T. L. R. 227.

of the subscription lists. If the permission is not applied for or is refused as above, the money must be returned (*w*).

Where application is going to be made for permission to deal as above, the Stock Exchange may in certain circumstances grant a certificate of exemption, in which case the requirements of the Fourth Schedule need not be complied with (*x*).

Companies sometimes evaded these provisions by being registered outside the United Kingdom ; but see now the special requirements as to foreign companies (p. 260, *post*).

SECTION 5

Form of Prospectus

A form of prospectus is set out in Appendix C, p. 408 *post*. The student should read this form and ascertain whether, and, if so, how, the provisions of the Act have been complied with.

SECTION 6

Share Pushing

The protection of investors which was intended to be effected by the requirements of the Companies Acts as to disclosure in prospectuses was sometimes evaded by persons who acted as touts or share-pushers, going from house to house and pushing shares or "units" by verbal representation frequently false or exaggerated.

The Act of 1929 prevented this to some extent by penalising share-pushing (*y*). This provision was found not to be adequate and not to protect sufficiently genuine and *bona fide* offers of shares or units.

The whole matter was dealt with by the Prevention of Fraud (Investments) Act, 1939 (*z*).

(*w*) Companies Act, s. 51.

(*x*) *Ibid.*, s. 39.

(*y*) Companies Act, 1929, s. 356.

(*z*) 2 & 3 Geo. 6, c. 16, repeating s. 356 of the 1929 Act and now amended by the Companies Act, 1948, s. 456 and Sched. XVI.

This Act provides that no person shall deal in securities, *i.e.* shares, debentures or "units" or other rights in shares or debentures, without obtaining a license from the Board of Trade, which may require a deposit of £500, but this is not to apply to members of a recognised Stock Exchange, certain banks and statutory corporations and persons acting under an authorised unit trust scheme (*i.e.* an arrangement authorised by the Board of Trade for persons to participate under a trust in profits arising from holding and dealing in securities). Fraudulent or misleading statements or concealments or reckless promises or forecasts are made an offence, and no circulars containing invitations to subscribe for shares or information tending to induce subscriptions must be distributed, except prospectuses which comply with the Companies Act.

CHAPTER VII

MEMBERS OR SHAREHOLDERS

SECTION 1

How Persons may become Members

PERSONS may become members of a company in any of the following ways :

(1) Persons who sign the Memorandum are deemed to have agreed to be members, and on the registration of the company must be put on the register of members (a).

(2) Persons who have agreed to become members, either—

(a) by applying for an allotment of shares, or

(b) by taking a transfer from a member,

become members when entered on the register of members.

(3) A person who acts as director is sometimes deemed to have agreed to take his qualification shares (*Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775).

As to 1.—Neither allotment nor registration is necessary to make a subscriber to the Memorandum a member of the company.

Every subscriber to the Memorandum must take the shares for which he subscribed, and pay for them, and

(a) Companies Act, s. 26.

he is only excused if **all** the shares have already been taken (*Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421).

If the company never becomes entitled to commence business, he can probably get his money back on the ground that the contract is void (*b*).

He must take them **from the company** :—(otherwise the first subscriber might take his one share and transfer it to the second, and so on), for the **same shares cannot be made to do double duty**.

As to 2.—A person who agrees to become a member (*c*), does not become a member until his name is put on the register. But he is entitled to specific performance of the company's agreement to make him a member.

Rectification of the Register.

The register is only *prima facie* evidence ; thus, if a person who has agreed to become a member is not put on the register, the court may rectify the register on the winding up of the company (*Re Barangah Oil Refining Co., Arnot's Case* (1887), 36 Ch. D. 702, at p. 707) ; and a person who is wrongfully removed from the register remains a member (*Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77) ; and if a person who has not agreed to take shares is put on the register, he is not a member (*Re Harvey's Oyster Co., Ormerod's Case*, [1894] 2 Ch. 474) ; and if he has been induced to take the shares by misrepresentation, the register can be rectified, if he applies to the court within a reasonable time after discovering the misrepresentation (*d*).

The applicant must prove by direct evidence that the statements were false, and he is not entitled to rely on

(*b*) See *Otto Electrical Manufacturing Co.*, [1906] 2 Ch. 390.

(*c*) For rules as to a contract to take shares, see pp. 89, 90.

(*d*) Such an application may be made by the company itself : *Re London Electrobuses Co., Ltd.*, [1906] W. N. 147.

admissions made by the chairman of directors at a meeting of shareholders (e) or on the report of an expert employed to report to the company (f).

Where there are no directors the court may appoint some person to rectify the register (g).

SECTION 2

Who may become a Member

(1) A company may become a member of another company, if it is authorised by its Memorandum to take shares, or if it takes the shares in payment of a debt by way of compromise (h) (*Re Lands Allotment Co.*, [1894] 1 Ch. 616, at p. 630).

But a company cannot purchase its own shares and become a member of itself, even if expressly authorised so to do by its Memorandum (i), and a subsidiary (k) company cannot hold shares in its holding company. Any allotment or transfer of shares in a company to its subsidiary is void.

There are exceptions in case of a company which is a trustee or executor or where shares were already held before the company became subsidiary; but, in this case, the right of voting cannot be exercised (l).

(e) *Re Devala Provident Gold Mining Co.* (1883), 22 Ch. D. 593. This decision was based on the theory that the chairman was an agent reporting to his principals, viz. the shareholders. This view is difficult to reconcile with *Percival v. Wright*, [1902] 2 Ch. 421, where it was held that the directors are not agents for the individual shareholders, and see *Djambi (Sumatra) Rubber Estates, Ltd.* note (f) below.

(f) *Djambi (Sumatra) Rubber Estates, Ltd.*, [1912] W. N. 192. If the directors in their report to the shareholders admit the truth of the expert's report, such admissions may be evidence against the company. S. C. 107 L. T. at p. 632, and see 29 T. L. R. 28.

(g) *Re Manihot Rubber Plantations, Ltd.* (1919), 63 Sol. Jo. 827.

(h) See Companies Act, s. 139 as to the way in which such a company can vote.

(i) *Trevor v. Whitworth* (1887), 12 App. Cas. 409.

(k) See p. 235, *post*.

(l) Companies Act, s. 27.

A company cannot lend money to any one for the purpose of purchasing its own shares and it is not lawful for a company to give, whether by means of a loan or the provision of security or otherwise, any financial assistance in connection with a purchase of, or subscription for, shares in the company or in its holding company (*m*). The penalty for breach of this rule is a fine; but a security given is not void (*n*).

Shares in a company can be held by an individual as trustee for the company, provided no funds of the company are used in acquiring them (*o*).

(2) **An infant** may take shares, subject to a right to repudiate them on attaining full age.

Hamilton v. Vaughan Sherrin Electrical Engineering Co., [1894] 3 Ch. 589

Miss H. (aged eighteen) applied for twenty £5 shares, and paid £1 each on allotment. No dividends were paid. Six weeks later she repudiated the shares:—**Held**, she could repudiate all liability.

But the infant cannot recover any money paid for the shares unless there has been a total failure of consideration, e.g. if the shares were absolutely worthless (*p*).

(3) **A married woman** even before 1882 could hold shares as her separate estate. If she held them otherwise, her husband was liable for calls. As to her present position, see p. 103, *post*.

A company may, if its Articles so provide, refuse to

(*m*) Companies Act, s. 54. There are some exceptions in favour of employees.

(*n*) *Victor Battery Co., Ltd. v. Curry's, Ltd.*, [1946] Ch. 242; [1946] 1 All E. R. 519.

(*o*) *Kirby v. Wilkins*, [1929] 2 Ch. 444.

(*p*) *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452, overruling *Hamilton v. Vaughan Sherrin Electrical Engineering Co.* (above), unless that case is distinguishable on the ground that the shares were worthless.

register a married woman as a member if there is any liability on the shares (q).

(4) A person who lends money to the company on a mortgage of its shares may become liable as a member in respect of those shares if they are registered in his name.

Re Patent Paper Manufacturing Co., Addison's Case
(1870), 5 Ch. App. 294

A. lent the company £500 by taking 100 £5 shares and paying for them, with an agreement that the money was to be paid back on one month's notice. A. was registered as the holder of the 100 shares. Subsequently A. gave the notice, and the company repaid the £500. A. transferred the shares to a nominee of the company:—Held, the company had no power to take back its own shares. A. was liable to pay £500 in respect of them.

(5) A person who takes shares in the name of a fictitious person, becomes liable as a member.

Re Central Klondyke Gold Mining Co., Savigny's Case, [1899] W.N. 1, 2.

S. carried on business under an assumed name; he took shares in that name and became bankrupt. His trustee tried to avoid liability as a shareholder:—Held, S. was liable.

Persons who do not become Members

A person who agrees to place shares does not thereby agree to take shares, and therefore does not become a member.

Re Monarch Insurance Co., Gorissen's Case (1873),
8 Ch. App. 507

G. agreed that he would "place" 1000 shares for the company in consideration of being appointed its agent. The company registered G. as a holder of 1,000 shares:—Held, G. was not a shareholder: he had not agreed to take shares, but only to find other persons who would take them.

(q) Married Women's Property Act, 1882 (44 & 45 Vic. c. 75), s. 7. This provision is not repealed by the Law Reform (Married Women & Tortfeasors) Act, 1935.

A trustee with power of sale cannot sell the trust property for shares.

Re Morrison, Morrison v. Morrison [1901] 1 Ch. 701

A testator gave all his property to trustees on trust to sell and invest in the ordinary trustee investments. He had an iron business. The trustees wished to turn the business into a company by selling it to a company in return for shares :—**Held**, the trustees had no power to do this, and the court had no power to sanction it.

By the Trustee Act, 1925, s. 57, the court is enabled to confer on trustees power to purchase shares in this way, even though such a purchase is not authorised by the trust.

A person may cease to be a member by—

- (1) transfer (but he remains liable to be put on the " B " list for one year, see pp. 78, 79) ;
- (2) forfeiture (see p. 109) ;
- (3) sale by the company under its lien (see p. 113) ;
- (4) death (the shares are transmitted to his personal representatives) ;
- (5) winding-up of the company.

SECTION 3

Liability of Members

(1) Apart from express agreement.

A shareholder must pay the whole nominal amount of his share **in cash**. Otherwise he will be liable for the amount unpaid on the winding-up of the company

" **Cash** " means " such a transaction as would, in an action at law for calls, support a plea of payment."

Thus, if the company owes A. £100, and A. then agrees to take 100 £1 shares in satisfaction of the debt, the shares are fully paid up **in cash**. It is not necessary for A. to pay a cheque for £100 to the company, and for the company to hand it back to A.

Larocque v. Beauchemin, [1897] A. C. 358

The company agreed to buy a paper mill for \$35,000 in cash. The vendors then agreed to take 50,000 shares in the company, and paid for some of them in cash, but the rest were paid for by the company retaining part of the \$35,000 which they owed the vendors. (NOTE.—This was not an agreement to sell for **shares**, but to sell for **cash**, and a later independent agreement to take shares) :—**Held**, the whole 50,000 shares had been paid for in cash. Lord MACNAGHTEN : " If a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money **at once** for the purchase of the property, and on the other side a *bona fide* liability to pay money **at once** on shares, so that, if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it appears to me that the Act does not make it necessary that the formality should be gone through of the money being handed over and taken back again."

The Courts have laid down the further rule that **shares cannot be issued at a discount**, *i.e.* a company cannot issue a £100 share with an agreement that only £75 shall be paid.

Ooregum Gold Mining Co. of India v. Roper, [1892] A. C. 125

The company was in difficulties. Its £1 shares stood at 2s. 6d. The directors issued 120,000 £1 shares with 15s. credited paid up, so that only 5s. was payable on each share :—**Held**, this would have been illegal, even if the Memorandum had expressly authorised it.

This can, however, now be done under s. 57 of the Act of 1948 (*q*), provided the issue is authorised by resolution of a general meeting and sanctioned by the Court. At least one year must have elapsed since the company was in a position to commence business, and the shares must be issued within one month after the sanction of the Court has been obtained. Every subsequent prospectus and balance sheet must contain particulars of

(*q*) Re-enacting s. 47 of 1929.

the discount allowed. The sanction may be given after the shares have been allotted (r).

Another limited exception to the rule is the payment of underwriting commission which is allowed subject to the restrictions of s. 53, see p. 187.

Subject to these exceptions, shares must not be issued at a discount even by way of compromise (*Mother Lode Consolidated Gold Mines, Ltd. v. Hill* (1903), 19 T. L. R. 341), nor in any other indirect way (s).

Mosely v. Koffyfontein Mines, Ltd., [1904] 2 Ch. 108

The company proposed to issue debentures at a discount of 20 per cent. (*i.e.* to borrow money and to become liable to repay £100 for every £80 lent). Every holder of a debenture was to have the right to surrender every £1 worth of his debentures in return for a fully paid £1 share :—**Held**, this arrangement was not legal, as the result would be that a holder might get 100 £1 shares for £80.

(2) Agreements to allot shares for a consideration other than cash.—Shares may be issued as fully paid up as consideration for the sale of a business or other property sold to the company. The company must register with the registrar within one month a contract in writing (or particulars of the contract if it is not in writing) (t) showing the title of the shareholder and the consideration that he gave for the shares (u).

By an Act of 1867 (v), the contract had to be registered at once, and if default was made, the shareholder was liable to pay for the shares in full.

Under the present Act, if default is made, the directors are subject to penalties, but the liability of the shareholder is not affected.

(r) *Re Derham and Allen, Ltd.*, [1946] Ch. 31.

(s) Cf. *Bury v. Famatina Development Corporation, Ltd.* [1909] 1 Ch. 754; affirmed [1910] A. C. 439.

(t) Companies Act, s. 52 (2).

(u) Companies Act, s. 52 (1).

(v) 30 & 31 Vict. c. 131, s. 25.

This is not an exception to the rule that shares must be fully paid up, but only to the rule that they must be paid in cash.

A person to whom shares are allotted as fully paid for a consideration other than cash may be held liable, whether or not a contract has been registered, if (1) The contract is fraudulent, or (2) the consideration is illusory, or (3) the contract shows clearly on the face of it that the consideration was of a less money value than the shares allotted.

Hong Kong and China Gas Co., Ltd. v. Glen, [1914]
1 Ch. 527

Glen sold a concession to the company in consideration of 400 shares of £10 each and one fifth of any increase of the company's capital over £20,000 :—Held, the 400 shares were fully paid, and the company was bound to allot to Glen one fifth of any increased capital : but such further shares would not be fully paid (*w*).

In any other case the court will not inquire into the adequacy of the consideration.

Re Wragg, Ltd., [1897] 1 Ch. 796

The vendors sold an omnibus business to the company for £46,000, of which £20,000 was to be paid in fully paid shares. The proper contract was filed. Evidence was given that the business was not worth anything like that amount :—Held, if there is fraud, the contract can be set aside ; but apart from that, if a contract is filed, the court will not go into the adequacy of the consideration (*x*).

A person who has taken shares which are not properly paid up may be ordered to pay for the shares in full, though he was ignorant of the law (*y*).

(*w*) And see *Re White Star Line, Ltd.*, [1938] Ch. 458 ; [1938] 1 All E. R. 607.

(*x*) And see *Mosely v. Koffyfontein Mines Ltd.*, [1904] 2 Ch. 108, at p. 116.

(*y*) *Re James Pilkington & Co.*, (1916), 85 L. J. (Ch.) 318.

Shares are often allotted as fully paid in **consideration of services** performed by the promoters before the incorporation of the company.

(1) If these services have enhanced the value of any property sold to the company, the allotment is really a part of the consideration for the sale of the property and is valid.

(2) If no property sold to the company has benefited by the services, it is difficult to see what is the consideration for the allotment, for **past services are in law no consideration**, unless rendered at request; and the company could not make such a request before it was incorporated, or ratify it afterwards (see pp. 10, 11). Such a consideration is therefore probably illusory.

(3) The company cannot agree that the liability on shares shall be wiped out in consideration of a promise of **future services** (a); but the company can agree to pay an immediate sum in cash for future services, and can then treat that sum as having been applied in payment of the liability on the shares (b).

A shareholder who transfers his shares remains liable to a certain extent; for on a winding-up two lists are made,

The "A" list or list of present members; and

The "B" list or list of persons who have ceased to be members within one year before the winding up.

Any person on the "B" list is liable to the extent of the amounts unpaid on his shares if—

(a) *Re Richmond Hill Hotel Co., Pallatt's Case* (1867), 2 Ch. App. 527.

(b) *Gardner v. Iredale*, [1912] 1 Ch. 700, at p. 716.

- (1) on the winding-up debts exist which were incurred while he was a member ; and
- (2) the members on the " A " list cannot satisfy the contributions required from them in respect of those shares.

(The position of persons on the " B " list is fully explained in *Helbert v. Banner, Re Barned's Bank* (1871), L. R. 5 H. L. 28, at p. 34. See p. 294, *post*).

SECTION 4

Register of Members

A company must keep a register of its members in one or more books (*c*). It may be kept at any office of the company where the work of making it up is done, and, where a company employs an agent to keep the register, the register may be kept at the office of the agent (*d*).

It is unnecessary to state the occupations of the members (*e*). Where the company keeps an index of the names of members, the index must be kept at the same place as the register (*f*).

The register must contain the name and address of each member, the amount and numbers of his shares (if any), (*c*) the date of acquiring them, and the amount paid up.

Unless the register is in the form of an index, there must also be an alphabetical index of members (*g*).

The register and index must be open to members gratis, and to non-members on payment of 1s. (*h*) and

(*c*) Companies Act, s. 110.

(*d*) *Ibid.*, s. 110, 2.

(*e*) Act of 1947, s. 51.

(*f*) Companies Act, 1948, s. 111 (3).

(*g*) *Ibid.*, s. 111.

(*h*) *Ibid.*, s. 113.

any person may demand a copy at 6d. per 100 words, but he may not make extracts (*Re Balaghât Gold Mining Co.*, [1901] 2 K. B. 665; overruling *Boord v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 596) (i).

Thus it is possible for any person who wishes to deal with the company to know who are the members, and for how much each is liable. It is generally safe to rely on the register, for although it is not conclusive it is *prima facie* (k) proof that the person on the register is the person liable. Thus, if a person allows himself to be on the register without objecting, he may be held liable; but if he was induced to become a member through fraud, the contract is void, and even if he did not discover the fraud until the winding-up, he is not liable.

***Re International Society of Auctioneers and Valuers, Baillie's Case*, [1898] 1 Ch. 110**

B. wished to join an old society called the "Auctioneers Institute of the United Kingdom." A new society, "The Institute of Auctioneers and Valuers," persuaded him to join, pretending to be the old society:—Held, B. may be struck off the register.

"No notice of any trust shall be entered on the register" (l).—This means that the company need not take any notice of a trust even if it has constructive notice that there is a trust.

***Simpson v. Molson's Bank*, [1895] A. C. 270**

Trustees held shares in the bank under a will upon trust for S. The trustees transferred some of the shares to a person who was not entitled to them. A copy of the will was deposited in the bank, and the president of the bank was one of the executors of the will: but in spite of this the bank registered the transfer:—Held, the bank was not liable to S. (m).

(i) The motives of the person requiring the copy appear to be immaterial: *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 248.

(k) See p. 70.

(l) Companies Act, s. 117.

(m) And see *Rearden v. Provincial Bank of Ireland*, [1896] 1 I. R. 532.

The result of this rule is that where shares are held by a trustee or nominee, there is usually no means of finding out who is the real owner of the shares and able to control the voting power. This has sometimes enabled directors and others to conceal their own overriding interest in transactions of their company or other companies, but now very drastic powers of investigation and interrogation are conferred upon the Board of Trade to enable it to discover who are the persons really interested in certain shares, and to impose restrictions on dealings with and voting in respect of such shares (u).

If a company itself claims an interest in any shares (e.g. claims a lien on the shares) it will be bound by constructive notice in the same way as any other person dealing with the shares (o).

It does not mean that there cannot be a trust of shares. If there is, the trustee's name is put on the register, and he is the shareholder, and is liable for calls, even though the calls exceed the value of the trust property in his hands.

The Trustee, however, is entitled to be indemnified by the beneficiary. Thus, though the company looks only to the person on the register, it is the beneficiary who is ultimately liable for the calls; and possibly the company could sue the beneficiary direct (standing in the shoes of the trustee as to his indemnity).

The beneficiary (if he is *sui juris*) must indemnify the trustee for all calls paid, even if they exceed the amount of the trust property.

Hardoon v. Belilos, [1901] A. C. 118

A stockbroker took 500 shares in the name of his clerk. The broker received the dividends. The company called upon the clerk to pay £400 in calls. The clerk claimed that he was entitled to be indemnified by the broker; but the

(u) ss. 47, 48 of the Act of 1947, re-enacted in ss. 172 and 173 of the Act of 1948.

(o) *Mackereth v. Wigan Coal and Iron Co., Ltd.*, [1916] 2 Ch. 293.

broker claimed that the indemnity must be limited to the value of the trust property (viz., the shares, which were valueless):—**Held**, the broker must indemnify the clerk by paying the whole £400 (*p*).

An **executor** of a deceased shareholder is not personally liable to pay calls, unless he applies to be put on the register and is entered on the register as the holder of the shares.

If he does, he is entitled to an indemnity from the estate.

If he does not, the estate is liable to the company for calls.

Thus the estate is ultimately liable in either case.

Where by the articles an executor is entitled to be put on the register on proof of his title, the company is not entitled to qualify the entry of his name on the register, by showing that he holds the shares in a representative capacity (*q*).

Another result of the rule that trusts shall not be put on the register is that where there are several mortgages of the same shares, the mortgagee first in date has priority, not the first who gives notice to the company (*r*).

Joint holders.—The articles usually provide that where there are joint holders of shares the member whose name appears first on the register may vote. Joint holders are entitled to be entered on the register in any order they like (*s*).

A company which transacts business in any of the colonies or dominions may keep a "Dominion Register," which will be part of its register of members (*t*).

(*p*) But this does not apply to the trustees of a club where the understanding is that the members are not to be called upon to pay more than their subscriptions (*Wise v. Perpetual Trustee Co.*, [1903] A. C. 139).

(*q*) *Re T. H. Saunders & Co., Ltd.*, [1908] 1 Ch. 415.

(*r*) See *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20.

(*s*) *Burns v. Siemens Brothers Dynamo Works*, [1919] 1 Ch. 225.

(*t*) Companies Act, s. 119.

SECTION 5

Annual Returns and Lists of Members

A company must every year make a return to be completed within 42 days after the annual general meeting, containing the particulars set out in the Sixth Schedule to the Act and send a copy to the Registrar (u).

The copy sent to the Registrar must be signed both by a director and the secretary.

A Company need not make an annual return in the year of its incorporation or in the following year if it is not required to hold an annual general meeting in that year (u).

The copy of the annual return forwarded to the Registrar and the certificate as to any balance sheet included in the return and any certificate as to the annual return of a private company must be signed both by a director and by the secretary (v).

The annual return must also state where the register is kept, if it is not kept at the registered office, and specify the particulars as to the secretary which must be contained in the register of directors and secretaries (see p. 197) (w).

The particulars set out in the Sixth Schedule to the Act which be must contained in the Annual return, may be summarised as follows—

1. The address of the registered office.
2. If the register of members is not kept at the

(u) *Ibid.*, s. 124.

(v) *Ibid.*, s. 126.

(w) Companies Act, Sched. VI, pt. I (2) and (6).

registered office, the address of the place where it is kept.

3. A summary (called the *Annual Summary*) distinguishing between shares issued for cash and shares issued for a consideration other than cash and specifying—
 - (a) The amount of capital and the number of shares into which it is divided.
 - (b) The number of shares taken since the commencement of the company.
 - (c) The amount of calls made on each share.
 - (d) The amount of calls paid.
 - (e) The amount of calls unpaid.
 - (f) The amount paid for underwriting shares and debentures since the last return.
 - (g) Any discounts allowed on the issue of shares unless written off.
 - (h) Discount allowed on the issue of debentures.
 - (i) The number of shares forfeited.
 - (j) The number of share warrants and the number of shares comprised in them.
4. The total amount of the debts secured by mortgages and charges
5. A list of names and addresses of members and of persons who have ceased to be members since the last return, stating the number of shares held and the number transferred, with an index if necessary.
6. Particulars as to the directors and secretary.

The form of the summary is set out in Part II of the Sixth Schedule.

There must be annexed to the annual return a copy certified by a director and the secretary of every balance sheet laid before the company during the period to which the return relates and a copy similarly certified of the auditor's and directors' reports. If the balance sheet did not comply with the requirements of the Act, the copy must be added to or amended accordingly. There are penalties for default (x).

A private company must now comply with these provisions as to annexing a balance sheet to the annual return unless it is an "exempt private company" (see p. 253, *post* (y)).

(x) Companies Act, s. 127.

(y) *Ibid.*, s. 129.

CHAPTER VIII

SHARES

A SHARE is a right to receive a certain proportion of the profits of the company, subject to and with the benefit of the regulations of the company' (a), and of the capital of the company when it is wound up. The shares in a company are numbered, except that, if all the shares in a company, or all the shares of a particular class, are fully paid up and rank *pari passu*, none of those shares need have a distinguishing number (b).

SECTION I

Allotment

Allotment is the appropriation to a person of a certain number of shares. This is usually done by a resolution of the Board of Directors.

An **application** for shares is an **offer** to take shares ; **allotment** is the acceptance of that offer by the company which creates a binding **contract** between the parties. Allotment remains merely a contract until the allottee is registered, when he becomes a Member of the Company (c).

The following is a form of application for shares :

(a) *Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279, at p. 288. *Inland Revenue Commissioners v. Crossman*, [1937] A. C. 26, at p. 40 ; [1936] 1 All E. R. 762, at p. 769.

(b) Companies Act, s. 74, re-enacting s. 69 of 1947.

(c) *Re Florence Land and Public Works Co., Nicol's Case*, *Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421.

Form of Application for Ordinary Shares

BLANK COMPANY, LIMITED

(Incorporated under the Companies Act, 1948)

Issue of 10,500 Ordinary Shares of £5 each

To the above-named Company

Gentlemen,

Having paid to your bankers the sum of £ , being a deposit of £1 per share on of the above-mentioned ordinary shares, I (we) request you to allot to me (us) that number of ordinary shares upon the terms of your prospectus, dated September 1st, 1948, and I (we) hereby agree to accept the same or any smaller number that may be allotted to me (us) and to pay the balance, if any, due on allotment as provided by the said prospectus, and I (we) authorise you to place my (our) name(s) on the register of members in respect of the shares so to be allotted to me (us).

To be written distinctly	}	Name in full (Rev., Mr., Mrs., or Miss) .
		Address in full .
		Occupation .
		Usual signature .
		Date , 19

The allotment of shares is governed by the Companies Act, and, subject to the provisions of the Act, by the common law rules of contract.

By s. 47 no shares which are offered to the public for subscription can be allotted until the " minimum subscription " (d) has been subscribed and the amount due on application (which must not be less than five per cent. of the nominal amount of the shares) has been paid.

If the minimum subscription is not subscribed within forty days after the issue of the prospectus, the money paid by subscribers must be returned forthwith. If not, the directors become liable to repay the money with

(d) See p. 52.

interest at five per cent. from the end of forty-eight days (e).

The effect of allotting shares before the minimum subscription has been subscribed is—

- (1) the allotment may be set aside within one month of the statutory meeting, or, where there is no statutory meeting, within one month after allotment; and
- (2) any director who has knowledge of the fact is liable to compensate the company or the members (f).

This section (except the provision as to the amount payable on application) does not apply to any allotment of shares after the first allotment of shares offered to the public.

A person to whom shares (which have been offered to the public) are allotted cannot safely deal with them until this section has been complied with, and the company has become entitled to commence business under s. 109 (see p. 89).

Finance and Issue, Ltd. v. Canadian Produce Corporation Ltd., [1905] 1 Ch. 37

The company by mistake allotted 40,000 shares before the minimum subscription (as required by the Act of 1900) had been subscribed :—**Held**, the allottees had a right to rescind their allotments, and an option given by the company to every allottee to have the allotment cancelled and the money returned was valid.

(e) The application moneys are considered to be duly paid when the cheques have been received in good faith and the directors have no ground to suspect that they will not be paid. Companies Act, s. 47.

(f) Companies Act, s. 49; and see *Burton v. Bevan*, [1908] 2 Ch. 240, where a director who was not present at the meeting at which the Board determined to go to allotment, was held not to be liable.

Where shares or debentures are offered by a prospectus issued to persons other than the existing holders, no allotment may be made until the third day after the day on which the prospectus is first issued, or on such later day as may be specified in the prospectus. This date is known as "the opening of the subscription lists."

Applications made in pursuance of such a prospectus shall not be revocable until after the expiration of the third day after the date of the opening of the subscription lists, unless some person liable under s. 43 for compensation for misstatements gives notice excluding or limiting his responsibility (g).

Where a prospectus states that application has been or will be made for the shares or debentures to be dealt with on any Stock Exchange, any allotment made on an application under the prospectus shall be void (1) if permission has not been applied for before the third day after the first issue of the prospectus or, (2) if permission is refused before the expiration of three weeks from the date of the closing of the subscription lists. Where permission has not been so applied for, or has been refused, the money must be returned and, in default, the directors become liable to refund it (h).

A new Company must not commence business so long as it may become liable to repay money under this section (i).

Subject to these provisions of the Companies Act the same rules apply to a contract to take shares as to any other contract. The application is the offer: the allotment is the acceptance.

There is no binding contract until the allotment has been made (by resolution of the Board), and

(g) Companies Act, s. 50 (5), re-enacting s. 59 (5) of 1947.

(h) *Ibid.*, s. 51.

(i) *Ibid.*, s. 109, 1 (c).

notice of allotment has been posted or has reached the allottee in some other way.

Dunlop v. Higgins (1848), 1 H. L. Cas. 381

The allotment letter was delayed in the post. The allottee repudiated:—**Held**, the contract was complete when the allotment letter was posted.

Household Fire Insurance Co. v. Grant (1879), 4 Ex. D. 216

The same result where the letter was lost in the post.

But if the company is bound to allot a certain number of shares to a certain person, the contract is complete as soon as the application is posted.

Thus, suppose on an issue of further capital each holder of three old shares is entitled to two of the new shares (*i.e.* two shares are offered to him on certain terms), the holder accepts the offer if he applies for the shares.

Notice of allotment is not necessary if the applicant states that he does not require notice.

If there is undue delay in the allotment, the offer lapses ;

Ramsgate Victoria Hotel Co. v. Montefiore (1866), L. R. 1 Ex. Ch. 109

M. applied for shares June 28th. Shares allotted November 23rd. M. refused to take them:—**Held**, the offer had lapsed before acceptance.

Conditional applications may be made ;

Re Universal Banking Co., Roger's Case, Harrison's Case (1868), 3 Ch. App. 633

R. wanted to be appointed local manager of a company. He was told he would have to take 100 shares. He applied for the shares, but was not appointed. He refused to take them:—**Held**, the application was conditional on his being appointed local manager, and he might refuse (*j*).

(*j*) See also *Humphrey and Denman v. Kavanagh (1925), Ltd.*, (In liquidation), 41 T. L. R. 378.

There is no contract if the applicant thinks he is applying to a different company: at any rate, if he is induced to do so by fraud (*Re International Society of Auctioneers and Valuers, Baillie's Case*, [1898] 1 Ch. 110: see p. 80).

Shares in a company are personal property even though the company owns land (*k*). There are, however, some exceptions, e.g. the New River Company, a share in which is real property (*l*). ✓

SECTION 2

Certificates

A member of a company has a right to a certificate of his shares, which must be prepared and ready for delivery within two months after the shares have been allotted or a transfer has been lodged unless the terms of issue otherwise provide (*m*).

If the company refuses to register a transfer, it must give notice of its refusal within two months (*n*).

The articles usually provide that several certificates may be given, each for one or more shares (*o*).

The certificate is usually in the following form:

Share Certificate,

BLANK, LIMITED

THIS IS TO CERTIFY that Thomas Smith of (address) is the registered proprietor of one hundred ordinary shares of ten pounds each, numbered 2551 to 2650 both inclusive, in the

(*k*) *Entwistle v. Davis* (1867), L. R. 4 Eq. 272.

(*l*) And may (subject to the Law of Property Act, 1925) be held by several persons as tenants in common (*Swayne v. Fawcener* (1699), Show. Parl. Cas. 207).

(*m*) Companies Act, s. 80.

(*n*) Companies Act, s. 78.

(*o*) See *Sharpe v. Topham's, Ltd.*, [1939] Ch. 373.

above-named company, subject to the Memorandum and Articles thereof, and that up to this date there has been paid in respect of each such share the sum of five pounds.

Given under the common seal of the said company the 11th day of March, 1948.

JOHN JONES }
WILLIAM BROWN } Directors

SAMUEL GREEN, Secretary.

The object of a certificate is to enable a shareholder on dealing with his shares to show at once a good *prima facie* title.

It is therefore very difficult for a shareholder to deal with his shares without producing the certificate. Consequently, money is often lent to the shareholder, the lender taking possession of the certificate by way of security.

Loss of the certificate.—The articles usually provide that, if a certificate is lost or destroyed, the company will grant a new one, on satisfactory proof of the loss or destruction and on being indemnified by the applicant.

The effect of a certificate.—"A certificate . . . is a statement that the company assert that the person to whom it is granted is the registered shareholder entitled to the shares included in the certificate, and . . . that the amount certified to be paid has been paid" (p).

The company may be liable in two ways :

1. Estoppel as to title.

If the company authorises the issue of a certificate stating that A. is the registered holder of certain shares, it cannot afterwards allege that A. is not entitled to those shares.

Dixon v. Kennaway, [1900] 1 Ch. 833

Liddell was the secretary of a company and a stockbroker. Mrs. D. applied to L. for 300 shares in the company, and paid for them. Pitman (clerk to L.), who owned no shares, executed a transfer of 300 shares to Mrs. D.

(p) Buckley, 11th ed., p. 145.

The company, without requiring P.'s certificate to be produced, registered the transfer and gave Mrs. D. a new certificate :—**Held**, the company is estopped from denying the validity of Mrs. D.'s certificate and is liable to her in damages.

But if an officer of the company who has no authority to issue certificates issues a **forged** certificate there is no estoppel.

Ruben v. Great Fingall Consolidated, [1906] A. C. 439

R. lent money to the secretary of the company on the security of a share certificate. The secretary signed his own name on the certificate, affixed the seal of the company, and forged the names of two directors :—**Held**, the certificate was simply a forgery, and the company was not bound by it.

A company may however be liable in damages for the fraud of its officer committed in the course of his employment (*q*).

2. Estoppel as to payment.

If the certificate states that the shares are fully paid, the company cannot afterwards allege that they are not fully paid.

Bloomenthal v. Ford, [1897] A. C. 156

B., the stationer of the company, agreed to lend £1,000 to the company on the security of 10,000 fully paid shares. The company issued 10,000 shares to him with a certificate on which they were described as fully paid. In fact, nothing had been paid. The company was wound up, and B. was put on the list of contributories :—**Held**, the company and its liquidator were estopped from denying that the shares were fully paid, and B. could be removed from the list.

Such a statement in the certificate would not help a person who knew that the shares were not paid for in full in cash (*r*).

(*q*) *Lloyd v. Grace, Smith & Co.* [1912] A. C. 716; *Longman v. Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646.

(*r*) *Re African Gold Concessions and Development Co., Markham and Darter's Case*, [1899] 1 Ch. 414.

The fact that the shareholder's partner is also a director of the company does not amount to constructive notice that the shares are not fully paid (s).

The certificate does not certify anything as to the equitable interest in the shares (t).

SECTION 3

Transfer

A shareholder has power to transfer his shares by s. 73 of the Companies Act.

The form of transfer is generally governed by the Articles. See Art. 23 of Table A, p. 368, *post*.

In spite of any provisions in the Articles to the contrary, the transfer must be in writing, and the company must not register a transfer unless a proper instrument in writing has been delivered (u). A transfer need not be by deed, unless the articles expressly require a deed.

A transfer is usually in the following form :

(Stamp, £1.)

I, Thomas Smith (the transferor), of _____, in consideration of the sum of one hundred pounds paid by John Jones, of _____, hereinafter called the said transferee,

Do hereby bargain, sell, assign and transfer to the said transferee :

250 shares of £1 each, 15 shillings paid, numbered 404,201 to 404,450, both inclusive, of and in the undertaking called Blank, Limited.

To hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution hereof ; and I, the said transferee, do hereby agree to accept and take the said shares, subject to the conditions aforesaid.

As witness our hands and seals, this twelfth day of March, in the year of our Lord one thousand nine hundred and forty-eight.

(s) *Re Coasters, Ltd.*, [1911] 1 Ch. 86.

(t) *Shropshire Union Railways and Canal Co. v. R.* (1875), L. R. 7 H. L. 496.

(u) Companies Act, s. 75.

Certificate for 250 £1 shares forwarded to the Company's office by Thomas Smith. Signed [Secretary]

Signed, sealed, and delivered, by the above-named Thomas Smith, in the presence of—

Witness's—

Signature, A. BAKER.

Address .

Occupation .

THOMAS SMITH (*Seal*).

Signed, sealed, and delivered, by the above-mentioned John Jones in the presence of—

Witness's—

Signature, B. GREEN.

Address .

Occupation .

J. JONES (*Seal*).

The transfer is executed by the transferor, and handed to the transferee with the share certificate. The transferee executes it, and sends it to the company for registration. Until registration the transfer is not complete, but a transferee for value has an equitable interest. The company must register the transfer as soon as possible, having regard to any inquiries that may be necessary. If the officers of the company delay the registration unduly, the transferee may be given all the rights which he would have had if they had registered it within a proper time.

Re Sussex Brick Co., [1904] 1 Ch. 598

Transferees of shares sent the transfer to the secretary. He replied that they would be submitted to the directors at the next board meeting. The company was wound up before the next meeting.

The liquidator refused to recognise the transferees as shareholders:—**Held**, the transferees must be registered "*nunc pro tunc*," i.e., as if they had been registered when the registration ought to have been made.

Stamps.—If the transfer is for value, it must be stamped *ad valorem* at the same rate as a conveyance

on sale (*i.e.* at the rate of £1 for every £50 or part of £50, except that special rates are fixed for amounts below £500) (*a*).

A transfer for a nominal consideration operating as a voluntary disposition *inter vivos* is chargeable as if it were a transfer on sale, except where no beneficial interest passes, as on the appointment of new trustees (*b*).

Every shareholder has a right to transfer his shares, and the transfer will be good, even if made to a man of straw when the company is in difficulties, for the purpose of avoiding liability, provided that it is an absolute out-and-out transfer without any trust or reservation for the transferor (*Re Mexican and South American Co., Grisewood and Smith's Case, De Pass' Case* (1859), 4 De G. & J. 544; *Re Discoverers Finance Corporation, Ltd., Lindlar's Case*, [1910] 1 Ch. 207, on appeal 312).

But this right may be restricted by the regulations (*c*). A power is usually given to directors to refuse a transfer if a share is not fully paid; and a discretionary power may be given them to refuse any transfer without assigning reasons (*d*).

The court will not interfere with their discretion unless it can be shown that they did not act *bona fide*.

Re Coalport China Co., [1895] 2 Ch. 404

By Article 3 of the company, "The directors may refuse to register any transfer . . . where they are of opinion that the proposed transferee is not a desirable person to admit to membership." The directors refused to register a certain transfer, and gave no reasons:—**Held**, in the absence of

(*a*) Stamp Act, 1891: Schedule, "Conveyance or Transfer on Sale." Finance Acts, 1920, s. 36 and 1947, s. 52.

(*b*) Finance (1909-10) Act, 1910, s. 74 (6).

(*c*) *A.-G. v. Jameson*, [1904] 2 I. R. 644.

(*d*) This is not allowed by the Rules of the Stock Exchange and should not be inserted if a quotation on the Stock Exchange is desired.

evidence that the directors had not acted *bona fide* their refusal could not be questioned (e).

Sometimes the Articles provide that the other shareholders shall be given the right of first refusal of the shares before they can be transferred to outsiders. Similarly an agreement that on the bankruptcy of any member his shares shall be sold to certain persons at a certain price is good (*Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279. See p. 37).

The company cannot object to transmission on death or (subject to the last paragraph) on bankruptcy, even if calls remain unpaid.

Specific performance of a contract to transfer shares may be decreed, unless the directors (acting within their powers) refuse to register the transfer; then an action for damages will lie against the transferor.

Mortgage of Shares.—Shares are usually mortgaged by depositing the share certificate with the lender. Sometimes the borrower also executes a **blank transfer**: he fills up the transfer form but leaves the name of the transferee blank, and deposits the certificate and the transfer with the mortgagee. If the money is not paid within a reasonable time, the mortgagee may put in his own name as transferee and get the transfer registered, and thus secure a transfer of the shares, or he may sell the shares after giving reasonable notice (f).

Deverges v. Sandeman, Clark & Co., [1902] 1 Ch. 579

D. bought shares through his broker, but did not pay the purchase price (carried over). He gave a blank transfer to his broker as security. The broker asked for payment in

(e) And see *Re Smith and Fawcett, Ltd.*, [1942] Ch. 304.

(f) Cf. *Stubbs v. Slater*, [1910] 1 Ch. 632, at p. 639. As to the authority of a broker to deposit share certificates of a client with his bankers, see *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K. B. 168; and as to the authority of an agent who holds a blank transfer, see *Fry and Mason v. Smellie and Taylor*, [1912] 3 K. B. 282.

July, 1897, and, after a long correspondence, the broker sold the shares in November, 1898 :—**Held**, the sale was good.

If the transferor prevents the purchaser from being registered as a shareholder, he is liable to pay damages if the shares afterwards fall in value (*Hooper v. Herts*, [1906] 1 Ch. 549).

If by the articles of the company a transfer of shares must be under seal, a blank transfer cannot be filled up without a power of attorney (*Powell v. London and Provincial Bank*, [1893] 2 Ch. 555). But the mortgagee may enforce the arrangement as an agreement to give him a legal transfer.

This form of mortgage of shares is not at all a good security: for, if the transferor fraudulently tells the company that he has lost his certificate, he can get a new one and transfer the same shares to a purchaser. It is no use to give an ordinary notice of the mortgage to the company, as the company is not bound to take notice of any trusts or equities affecting the shares. •

The only safe course is to give the company notice supported by affidavit under order 46, r. 4 (g).

This is called “notice in lieu of *distringas*” because it takes the place of the old writ of *distringas*. The mortgagee simply files an affidavit and a form of notice at the Central Office (h): he then serves an office copy of the affidavit and a duplicate of the notice on the company. The effect is that if the mortgagor attempts to transfer the shares, the company must give the mortgagee notice that it will register the transfer unless he takes proceedings within eight days to prevent it.

Priorities as between several transferees.—If none of the transfers are registered, the first in point of time has priority (*Peat v. Clayton*, [1906] 1 Ch. 659).

(g) Rules of the Supreme Court.

(h) Of the Royal Courts of Justice.

But if a transferee, who is later in date, is the first to have himself registered as a member, he gets priority.

And this priority is not lost merely because there is some detail which remains to be done by the company before he is put on the register (*Moore v. North Western Bank*, [1891] 2 Ch. 599).

This detail must be something that the company is bound to do.

Ireland v. Hart, [1902] 1 Ch. 522

I. held shares as trustee for his wife. Later he deposited with H. a blank transfer and the certificate, as security for his own debt. (Thus I.'s wife had the earlier equity.) H. filled up the transfer form and took it to the company for registration, but I. told the company not to register the transfer, and the company refused to do so.—**Held**, the wife was first in time, and therefore had priority, for the company were not bound to register the transfer to H. if they had any good reason for refusing.

Certification of transfers.—If a shareholder transfers part only of his shares, a new certificate will be required. Thus A. has one hundred shares and wishes to sell fifty to B. A. hands his certificate and transfer to the company. The company stamps on the transfer (before it is handed to B.) “certificate for 100 shares has been lodged at the company’s office (signed) _____, secretary” (see form on p. 94). The company is said to “certify” or “certificate” the transfer. On registration of the transfer, the company prepares two new certificates for fifty shares each and gives one to A. and one to B.

A delivery of a “certified transfer” in this way is accepted by the Stock Exchange as a good delivery of the shares. The certification by the company of a transfer of shares is now to be taken as a representation by the company to any person acting on the faith of the certification, that there have been produced to the company such documents as on the face of them show

a *prima facie* title to the shares in the transferor named in the instrument of transfer, but not as a representation that the transferor has any title to the shares. If a false certification is made negligently, the company is under the same liability as if it had been made fraudulently (i).

This is a new provision of the Act of 1947, and obviously modifies the law as laid down under the earlier Acts by the following case—

George Whitechurch, Ltd. v. Cavanagh, [1902].
A. C. 117

Transfers of shares were lodged with the secretary of the company without the certificates. The secretary fraudulently certified that the certificates were in the company's office:—**Held**, the company was not liable. A company does not do more than authorise the secretary to give receipts for certificates which have actually been lodged (h).

The company usually retains the original certificate, and, when the transfer is complete, the original certificate is cancelled and new certificates are issued by the company. If the company negligently parts with the original certificate and enables the transferor to commit a fraud, then

- (1) it may be liable to the transferee if he is damaged thereby ; but
- (2) it is not liable to any one else.

Longman v. Bath Electric Tramways, Ltd.,
[1905] 1 Ch. 646

B. transferred 1,500 shares to H. and M. The company certificated the transfer, and by mistake sent the original certificates to B. B. borrowed from L. on the security of these certificates :—**Held**, the company was not liable to L.

(i) Companies Act, s. 79.

(h) Followed : *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation, Ltd.* (H. L.), (1934); 151 L. T. 1.

If a transfer is forged, and the company registers the transfer and gives a certificate to the transferee, the true owner remains entitled to be put back on the register. The company does not incur any liability in damages by putting the transferee's name on the register, but, if it issues a certificate, and any person acts on the faith of it and suffers damage, the company will be liable (*l*).

When the company receives a transfer for registration, it usually writes to the transferor telling him of the proposed transfer, and saying that the transfer will be registered unless he objects. This gives the holder of shares an opportunity of preventing fraudulent or forged transfers from taking effect. The holder is not bound to reply to the letter, and if he does not, he will not be thereby estopped from denying the validity of the transfer (*m*).

If a shareholder transfers his shares, and the transfer turns out to be invalid, he remains liable for calls on the shares. See *Re Patent Paper Manufacturing Co., Addison's Case* (1870), 5 Ch. App. 294 on p. 73, *ante*.

If the transfer is valid, the transferee becomes liable, on an implied contract, to pay subsequent calls, and to indemnify the transferor against any liability in respect of them, subsequent to the date of the transfer (*n*).

Trifling irregularities in the execution of a transfer do not make it void.

Thus a transfer may be good, though the shares are wrongly numbered (*o*) ; and if the transferee is registered as the holder of the shares, the transfer will be effective though it is not signed by the transferee (*p*).

(*l*) *Bloomenthal v. Ford*, [1897] A. C. 156.

(*m*) *Barlon v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77.

(*n*) *Levi v. Ayers* (1878), 3 App. Cas. 842.

(*o*) *Re International Contract Co., Ind's Case* (1872), 7 Ch. App. 485.

(*p*) *Re Taurine Co.* (1883), 25 Ch. D. 118.

Transfers made during the winding up of the company are void, unless sanctioned by the court or the liquidator (q).

SECTION 4

Transmission

On the death of a shareholder his shares vest in his personal representatives (r), and his estate remains liable for calls. His representatives can sell the shares without being registered, but subject to the provisions of the articles they are entitled to be put on the register if they wish.

For this purpose the company is bound to accept production of probate or letters of administration as sufficient evidence of their title (s).

If the representatives are thus put on the register, or if they buy new shares on behalf of the deceased's estate, they become personally liable for calls, but are entitled to be indemnified by the beneficiaries.

In order that the company may get the benefit of this liability, the articles frequently contain clauses intended to induce or compel the representatives of a deceased shareholder to be registered within a certain time. See Article 30 of Table A (t).

A notice served at the registered address of a dead shareholder is valid, if the company has no notice of his death (u). If the company has notice of his death the notice should be served on his representatives. It will, however, be valid, even if the company has notice of the

(q) See p. 280, *post*.

(r) Shares in a limited company have always been personal property, even though the company holds land. See p. 91.

(s) Companies Act, s. 82.

(t) P. 369, *post*.

(u) *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622.

death, at any rate if the notice comes to the knowledge of the executors (*v*).

On the bankruptcy of a shareholder his trustees in bankruptcy can sell and transfer his shares, or may repudiate them if there is a liability.

If the shares are repudiated, the company can prove in the bankruptcy of the shareholder for the amount remaining unpaid on the shares. If this is done and the company receives a dividend in the bankruptcy, it cannot afterwards sue the bankrupt for calls; but the shares are not fully-paid shares, and are not entitled to rank as fully-paid shares in the winding up of the company (see *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1).

On Marriage.—Before 1883 on the marriage of a woman entitled to shares, the shares became vested in her husband: now they remain her own property (*w*).

On the appointment of new trustees the shares must be transferred to the new trustees by an ordinary transfer. They cannot be vested in the new trustees by a vesting declaration (*x*).

SECTION 5

Share Warrants

When shares are **fully paid** the company may (if authorised by its regulations) issue **share warrants** under seal, stating that the bearer of the warrant is entitled to the shares therein specified. The shares then become transferable by delivery of the share warrant (*a*).

(*v*) *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456 at p. 467. *Allen v. Gold Reefs of West Africa, Ltd.* [1899] 2 Ch. 40 varied [1900] 1 Ch. 656, at p. 670 (C. A.).

(*w*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, Law Reform (Married Women & Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30) s. 2.

(*x*) Trustee Act, 1925, s. 40 (4) (*c*).

(*a*) Companies Act, s. 83 (3).

Such share warrants are negotiable instruments (*Bechuanaland Exploration Co. v. London Trading Bank, Ltd.*, [1898] 2 Q. B. 658, see pp. 161, 163).

Note that this can only be done when the shares are fully paid. No stamp duty is payable on a transfer, but a heavy stamp duty must be paid when the warrants are first issued (*b*).

A share warrant is usually in the following form :

THE BLANK COMPANY, LIMITED

SHARE WARRANT

This is to certify that the bearer of this warrant is entitled to fully paid shares of £ each in the above-named company, subject to the regulations of the company and to the conditions indorsed hereon.

The conditions indorsed on the share warrant contain the following among other provisions :

1. Warrants shall only be issued on the request of the shareholder.
2. The certificate must be surrendered to the company.
3. Coupons for dividends shall be attached.
4. Dividends may be paid to the bearer of the coupons.

When a share warrant is issued in respect of any shares, the name of the shareholder is struck off the register, because the shareholder thenceforth is the person (whoever he may be) who holds the share warrant, and the history of the shares no longer appears on the register, as the company does not know who the shareholder is, or who is entitled to the dividends. For this reason, "coupons" are attached to each share warrant, dated with the dates on which dividends will become payable during several years following the issue

(*b*) Three times the *ad valorem* stamp duty on a transfer at the nominal value : Stamp Act, 1891 (54 & 55 Vict. c. 39), sched. i. Finance Act, 1920, s. 38.

of the share warrant, and the dividend will be paid on each such date to the person who produces the appropriate coupon.

The holder of a share warrant is not strictly a member of the company under s. 26 of the Companies Act (see p. 69), because, though he may have agreed to become a member, his name is not entered on the register. But where there are share warrants, the articles usually provide that the holder of a share warrant shall be a member of the company and shall have all the powers of voting, etc., as if he were on the register, and that he must produce his share warrant to the company before he can attend any meeting or vote.

SECTION 6

Calls

Shares are frequently issued in the following way : (say) £100 each, payable as to £10 on application, £20 on allotment, another £20 in three months' time, and the remaining £50 when called for.

The first two and probably the third of these payments (viz., the £10, £20 and £20), are not "calls" (c).

If the company wishes to call in the whole or part of the remaining £50, the directors make a "call."

Each shareholder is under a statutory liability, in the nature of a specialty debt (d), to pay the remaining £50 when thus called upon. The call is made in the manner specified in the Articles, usually by the directors, who pass a resolution at a board meeting and direct the secretary to give all shareholders notice of the call.

(c) *Croskey v. Bank of Wales* (1863), 4 Giff. 314.

(d) Companies Act, s. 20. This section seems to imply that the period for the Statute of Limitations is 12 years. Limitation Act, 1939.

If the call is made otherwise than in the manner specified in the Articles, the call is invalid.

Re Cawley & Co. (1889), 42 Ch. D. 209

A resolution of the directors was passed, fixing the amount of a call, but it omitted to fix the date of payment :—**Held**, there was no valid call, until a subsequent resolution was passed, fixing the date of the call.

If a call is invalid, the shareholder is not bound to pay, and he may obtain an injunction (*e*) restraining the directors from forfeiting his shares, but he cannot restrain them from taking proceedings for the recovery of the call. His remedy in this case is to defend the action.

A call cannot be made on some of the members only, unless the articles expressly give this power (*Galloway v. Hallé Concerts Society*, [1915] 2 Ch. 233).

Mere trifling irregularities will not make a call invalid, and the Articles may provide that a call shall be good in spite of any irregularity.

Dawson v. African Consolidated Land and Trading Co., [1898] 1 Ch. 6

The Articles of the company contained a clause similar to Article 105 of Table A (*post*, p. 385). Three of the directors made a call. One of them happened to be disqualified by having parted with his qualification shares for a few days :—**Held**, the call was good.

The Articles may also provide that if a call is not paid when due, interest will be charged at a certain rate.

The power to make a call is in the nature of a trust to be exercised by the directors for the benefit of the company. If, therefore, a call is made, not for the benefit of the company, but for the advantage of the

(*e*) It is frequently made a condition of relief that the money should be paid into court. *Lamb v. Sambas Rubber and Gutta Percha Co., Ltd.*, [1908] 1 Ch. 845.

directors, the call may be prevented by an injunction, or the directors may be compelled to hand over for the benefit of the company the advantage gained by them.

The following is an example of a call properly made.

New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock, [1894] 1 Q. B. 622

The A. company, in accordance with powers in its Memorandum, sold its undertaking to the B. company for shares in the B. company. Some of the capital of the A. company had not been called up, and the A. company called up this capital for the purpose of paying it over to the B. company. Some of the shareholders objected :—**Held**, the call was good.

In the following case the method of making the call was held to have been improper :—

Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56

The directors paid up nothing on their own shares, but made all the other shareholders pay 3s. 6d. on each share, partly on allotment, and partly by a call. The directors did not tell the other shareholders of this difference :—**Held**, this was a breach of trust, and the directors must pay to the company 3s. 6d. on each of their shares.

The directors may (if authorised by the regulations) allow shareholders to pay up the amount due on their shares before any call has been made, and may pay interest on the amount so paid “ **in advance of calls.**”

But directors must only exercise this power if it is for the benefit of the company.

**Re European Central Rail Co., Sykes' Case (1872),
L. R. 13 Eq. 255**

The company had no money wherewith to pay the directors' fees. The directors therefore paid into the company's bank the amounts remaining due on their shares, and on the same day paid the amount to themselves in payment of their fees :—**Held**, this payment was not for the benefit of the company, and the directors remained liable to pay the amount as still due on their shares.

A shareholder who has paid up money in advance of calls, becomes a creditor of the company for the amount due to him as interest (*f*); therefore, if there are no profits, the interest must be paid out of capital (*Lock v. Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461).

Calls cannot be made until the minimum subscription (*g*) has been allotted (Companies Act, s. 109).

Calls must be paid in cash: otherwise the shareholder will remain liable on the winding-up of the company. If, however, cash to the amount of the call is actually due from the company to the shareholder for his services, the call may (before winding up) be set off against this amount, for the transaction amounts to a payment in cash (*h*).

On a transfer of shares, the transferee is under an implied contract to indemnify the transferor against subsequent calls (*i*). If, however, the call was made before the transfer, but payable after the transfer, the transferor apparently remains liable to pay the call; for a transferor "transfers his rights to future payments and his liability to future calls" (*Re National Bank of Wales, Taylor, Phillips and Rickard's Cases* [1897] 1 Ch. 298, at p. 306).

The date when a call is "made," depends on the Articles of the company. If these are silent, the date of the resolution of the directors is usually the date of the call; but it depends on the practice of the company (*k*).

(*f*) But it does not follow that the Company is entitled to repay the amount so advanced—*London and Northern S.S. Co., Ltd. v. Farmer*, (1914), 111 L. T. 204.

(*g*) See p. 52.

(*h*) Cf. *Larocque v. Beauchemin*, [1897] A. C. 358, the facts of which are summarised on p. 75, *ante*.

(*i*) See p. 101.

(*k*) *Addams v. Ferick* (1859), 26 Beav. 384, at p. 393.

If a call is not paid within twelve years after it is made, the claim of the company is barred under the Limitations Act (*kk*).

After winding up, debts due from the company cannot be set off against calls. See p. 293.

If a shareholder wishes to resist a call on the ground of misrepresentation, he must apply at once (by counterclaim or separate action) for rectification of the register (*l*).

SECTION 7

Forfeiture

The directors have no power to declare the shares of any member to be forfeited unless such power is given them by the Articles. See Articles 33-39 of Table A on pp. 369-371.

The Articles usually provide that, if a shareholder does not pay calls, his shares may be declared forfeited. The shares then become the property of the company, and may be sold for any price they will fetch. To this extent, **forfeited shares may be re-issued at a discount**. But the shares so sold remain unpaid to the extent that they were unpaid at the time of the forfeiture.

Morrison v. Trustees, Executors and Securities Insurance Corporation (1898), 68 L. J. Ch. 11

Several £10 shares with £3 paid were forfeited. The capital was afterwards reduced by converting these shares into £5 5s. shares with £2 5s. paid. The directors then sold the forfeited shares for £1 10s. each :—**Held**, this sale was good ; but it was suggested that the shares could not have been sold as being more than £2 5s. paid up (*m*).

(*kk*) see p. 105, *ante*.

(*l*) *First National Reinsurance Co. v. Greenfield*, [1921] 2 K. B. 260.

(*m*) See also *New Balkis Eersteling, Ltd. v. Randl Gold Mining Co.*, [1904] A. C. 165.

A purchaser of forfeited shares cannot, as a rule, vote until all arrears of calls are paid (*Randt Gold Mining Co., Ltd. v. Wainwright*, [1901] 1 Ch. 184).

Though the forfeiture and cancellation of shares really amounts to a reduction of capital, it can be done without leave of the court, as the cancellation of forfeited shares is authorised by Article 36 of Table A.

The power to declare shares forfeited is in the nature of a trust to be exercised for the benefit of the company. Thus, if shares are declared forfeited for the purpose of relieving a friend from liability, the forfeiture may be set aside.

Re Esparto Trading Co. (1879), 12 Ch. D. 191

H. and G. were given certain shares to qualify them as directors. They paid nothing on the shares. Later, the company was not doing well, and H. and G. asked the company to cancel their shares. This was done :—**Held**, H. and G. were liable to pay the whole nominal amount of their shares.

Shares cannot be forfeited except for non-payment of calls or for some other similar reason contemplated by Article 35 of Table A as a cause of forfeiture. An attempt to forfeit shares for other reasons has been held to be illegal (*n*).

Though forfeiture is in the nature of a penalty, equity will not relieve a shareholder from forfeiture if it is duly and *bona fide* declared.

Sparks v. Liverpool Waterworks Co. (1807), 13 Ves. 428

By a by-law of an incorporated company, shares were to be forfeited if calls were not complied with within ten days. S. was absent from London for twenty-seven days after the call was made. His share was forfeited :—**Held**, S. cannot be relieved from the forfeiture.

(*n*) *Hopkinson v. Mortimer, Harley & Co., Ltd.*, [1917] 1 Ch. 646.

But a slight irregularity will make the forfeiture void (unless it is the company itself that tries to say that the forfeiture is bad), and the shareholder may bring an action for annulment of the forfeiture.

Garden Gully United Quartz Mining Co. v. McLister
(1875), 1 App. Cas. 39

Three directors declared certain shares forfeited; but two of the three had been re-elected at a meeting of which the proper notice had not been given (three directors were a quorum) :—Held, the forfeiture was bad.

Or he may (if the Articles so provide) prove for damages on the winding up of the company (*Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598).

Any clause in the Articles is void which provides that a shareholder shall forfeit his shares if he takes any proceedings against the company, or which in any way restricts the right of a shareholder to present a petition for winding up the company (*Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122).

Where the liability of the shareholder to pay the call is questioned, the court may restrain the company from declaring the shares forfeited during the trial of the action (o). The plaintiff is usually required to pay the amount of the call into court: but this is not necessarily a condition precedent to the granting of an injunction (p).

If shares are forfeited, the company cannot sue the shareholder for the calls which he has not paid unless the Articles expressly so provide. If they do, he cannot be made liable as a contributory for calls, for he has ceased to be a member, but he may be sued as an ordinary debtor to the company.

(o) *Lamb v. Sambas Rubber and Gutta Percha Co., Ltd.*, [1908] 1 Ch. 845.

(p) *Jones v. Pacaya Rubber and Produce Co., Ltd.*, [1911] 1 K. B. 455, at p. 459.

**Ladies' Dress Association, Ltd. v. Pulbrook, [1900]
2 Q. B. 376**

A.'s shares were forfeited for unpaid calls. More than one year afterwards the company was wound up. If A.'s liability depended on his being a contributory to the company, he could not be made to contribute after ceasing to be a member for one year :—**Held**, A. was liable as an ordinary debtor, and could be sued.

SECTION 8

Surrender

The articles frequently give power to the directors to accept surrenders of shares ; this relieves them from going through the formality of forfeiture, if the shareholder is willing to surrender the shares. But a **surrender of shares which are not fully paid can only be accepted where a forfeiture would be justified.**

**Bellerby v. Rowland and Marwood's S.S. Co., Ltd.,
[1902] 2 Ch. 14**

Three of the directors of a company, in order to relieve the company of a loss of £4,000 which had been incurred, agreed to surrender for the benefit of the company several of their shares. The shares were £11 shares, and had been paid up to the extent of £10 per share :—**Held**, the surrender was void, and the directors remained holders of the shares.

The same rule applies to **fully paid shares** which are surrendered for the purpose of being **cancelled (q).**

“ A company cannot be a shareholder of itself. Every surrender of shares, **whether fully paid up or not**, involves a reduction of capital, which is unlawful except when sanctioned by the court. Forfeiture is a statutory exception and is the only exception ” (r).

(q) *Bellerby v. Rowland and Marwood's S.S. Co., Ltd.*, [1902] 2 Ch. 14

(r) Per Cozens-Hardy, L. J., in *Bellerby v. Rowland and Marwood's S.S. Co., Ltd.*, *supra*. This dictum goes further than *Trevor v. Whitworth* (1887), 12 App. Cas. 409, at p. 418.

But it has been held that fully paid shares can be surrendered without leave of the court provided the surrender does not involve a reduction of capital (s), e.g. in exchange for other shares of the same nominal value (t).

A surrender will be void if it amounts to a purchase of the shares by the company, or if it is accepted for the purpose of relieving a member from his liabilities (*Re Companies Guardian Society, Wallscourt's (Lord) Case* (1899), 7 Mans. 235); but a shareholder may transfer his shares to trustees in trust for the company by way of gift. This is not a surrender (u).

SECTION 9

Lien

The Articles generally provide that the company shall have a first lien on the shares of each member for his debts and liabilities to the company. See Article 11 of Table A, p. 365, *post*.

The effect of this is to give a charge to the company over the shares of each member to secure any debt which may be due from the member to the company. The lien also extends to the dividends on the shares.

Power should also be given to the company to enforce the lien by sale. For though the company has a charge, there is some doubt whether it is a mortgage by deed, and if it is not, no power of sale is implied under s. 101 of the Law of Property Act, 1925. Power should also be given to the directors to appoint some person to transfer the shares sold, as the company cannot now register a transfer without an instrument of transfer (v).

(s) *Re Denver Hotel Co.*, [1893] 1 Ch. 495.

(t) *Rowell v. Rowell (John) & Sons, Ltd.*, [1912] 2 Ch. 609.

(u) *Cree v. Somervail* (1879), 4 App. Cas. 648, at p. 661; *Kirby v. Wilkins*, [1929] 2 Ch. 444.

(v) Companies Act, s. 75.

The company cannot enforce its lien by **forfeiture**: for this would amount to foreclosure without an order of the court. Any clause in the Articles giving the company power to do so (except where the lien is for unpaid calls), would probably be void (see p. 110, *ante*).

If the company has a lien on A's shares for a debt, and A. raises the money from B. to pay the debt, A. may call upon the company to assign its lien to B.

Everitt v. Automatic Weighing Machine Co., [1892]
3 Ch. 506

E. owed £4,670 to the company. The company pressed for payment and threatened to sell E.'s shares. H. agreed to pay the £4,670 to the company at the request of E., on condition that the company transferred its lien on the shares to him (H.). The company refused to do this:—**Held**, the company was bound to transfer its lien.

Priority.—If a shareholder mortgages his shares and the mortgagee gives notice to the company, and then the shareholder incurs a liability to the company, the mortgage has priority over the lien of the company.

Bradford Banking Co., Ltd. v. Briggs & Co., Ltd.
(1886), 12 App. Cas 29.

The Articles gave the company a "first and paramount lien" over the shares for calls, etc. A shareholder deposited his share certificates with the bank as security for an overdraft. The bank gave notice to the company. Then the shareholder became indebted to the company for coal supplied by the Company. The company claimed—

- (1) A first lien by agreement;
- (2) that it need not take notice of any trust:—

Held, the bank have priority. The notice was not "notice of a trust" (*w*).

But the regulations may provide that any mortgagee who takes with notice of the company's lien, may be postponed to that lien.

(*w*) And see *Mackervell v. Wigan Coal and Iron Co., Ltd.*, [1916] 2 Ch. 293.

The Articles should give the company a lien for all sums in which a shareholder may be "indebted" to the company. This is better than the word "due," for this reason: Suppose a shareholder owes money to the company and gives a bill of exchange payable in six months, the debt is not due, though the shareholder is indebted, so that the lien will only attach if "indebted" is used (x).

The company may enforce the lien against the registered shareholder even though he is only a trustee.

New London and Brazilian Bank v. Brocklebank
(1882), 21 Ch. D. 302

The trustees of a marriage settlement invested some of the trust funds in 123 £20 shares in the company. The Articles contained a clause similar to Article 11 of Table A (*post*, p. 365), and also provided that the lien should apply to a debt due from a member jointly with other persons who were not members. One of the trustees was a partner of a firm which owed money to the company:—Held, the company has a lien for the partnership debt over the 123 shares.

But the lien of the company would not prevail, if the company had notice of the trust before the debt to the company was incurred (y).

It seems to follow that if a shareholder sells his shares, they do not become subject to a lien for debts incurred by him after the transfer has been lodged with the company for registration, even though the company refuse to register the transfer.

If a shareholder only sells some of his shares, the buyer can insist on the company paying itself first out of the shares which are not sold (*Gray v. Stone and Funnell* (1893), 69 L. T. 282).

The death of a shareholder does not destroy lien; in fact, the lien is good if it is first imposed after his death (*Allen v. Gold Reefs of West Africa, Ltd.* [1900] 1 Ch. 656; see p. 42).

(x) *Re Stockton Malleable Iron Co.* (1875), 2 Ch. D. 101.

(y) *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29.

CHAPTER IX

CAPITAL

THE word "capital" is used in several senses—

(1) **Nominal Capital** = the nominal value of the shares which the company is authorised to issue by its Memorandum. This must be stated in the Memorandum, and also each year in the annual summary (a).

(2) **Issued capital** = the nominal value of the shares actually issued.

(3) **Paid-up capital** = the amount paid up or credited as paid up on the shares.

The word "capital" is sometimes used to denote the actual assets of the company, *e.g.* "fixed capital" and "circulating capital." See p. 133, *post*.

The phrase "debenture capital" is sometimes used to mean the amount borrowed by the company and secured by debentures. This, however, is not a proper use of the word "capital," as borrowed money is not capital at all.

SECTION 1

Classes of Capital

The capital may be divided into different classes of shares, or it may consist wholly or partly of stock (see p. 122). This may be provided either in the Memorandum or in the Articles. Generally speaking it is more convenient for the Articles to confer power to divide the capital into different classes with special rights, and to

(a) Companies Act, s. 124.

specify the rights of each class of shareholders. If no power is given to divide the shares into classes, or to sub-divide the shares, either in the Articles or in the Memorandum, the company can give itself power to do so by altering its Articles (*Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361). See p. 39.

If the rights of the different classes of shareholders are fixed by the Articles and not by the Memorandum, they can be altered by special resolution (*b*) ; if the rights are fixed by the Memorandum, they can be altered if the Memorandum provides for a special method of alteration but not by special resolution under s. 23 (*c*).

If the Memorandum does not provide for or prohibits the alteration of the rights, they may still apparently be altered by a scheme of arrangement with the sanction of the Court under s. 206.

The Articles frequently provide that the rights of the various classes of shares may be varied by agreement signed by the holders of a certain proportion of the shares of each class, or by resolutions passed at separate meetings of holders of shares of that class.

Where a separate meeting is required by the Articles, only those shareholders who hold shares of the class in question should be present at the meeting, though the meeting can waive this requirement if it thinks fit.

If the Memorandum or the Articles provide for the variation of rights, a variation carried out in the manner so provided will be binding on all the shareholders, but persons holding 15 per cent. of the shares of the class may apply to the Court to cancel the variation (*d*).

(*b*) *Re Australian Estates and Mortgage Co., Ltd.* [1910] 1 Ch. 414.

(*c*) Companies Act, s. 23 (2) and see *Re Welsbach Incandescent Gas Light Co., Ltd.*, [1904] 1 Ch. 87., where a special method of altering the rights was provided in the memorandum,

(*d*) See p. 29, *ante*.

Capital is frequently divided into—

- (1) Preference shares ;
- (2) Ordinary shares ;
- (3) Deferred shares.

1. **Preference shares.**—The holder of preference shares is usually entitled to a fixed dividend of, say, five per cent. before any dividend is paid on the ordinary shares. But if so, he is (unless the articles expressly so provide) not entitled to more than his five per cent. however prosperous the company may be (e).

Preference shares are either **cumulative** or **non-cumulative**. Where they are cumulative, then, if the profits of the company in any year are not sufficient to pay the fixed dividend on the preference shares, the deficiency must be made up out of the profits of subsequent years.

Preference shares are presumed to be cumulative, and ambiguous language in the Articles will not be enough to make them non-cumulative.

Foster v. Coles and Foster (M. B.) & Sons, Ltd.,
[1906] 22 T. L. R. 555

The articles originally provided that the preference shares should be cumulative. The Articles were altered on reconstruction and the word "cumulative" was omitted:—**Held**, they were still cumulative, as there was no express contrary intention.

But they may be made non-cumulative by express provision or by any language which is sufficiently clear.

Staples v. Eastman Photographic Materials Co.,
[1896] 2 Ch. 303

The Articles provided that "The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of ten per cent.

(e) *Will v. United Lankat Plantations Co., Ltd.*, [1914] A. C. 11.

per annum " :—**Held**, this was sufficient to make the shares non-cumulative (f).

Unless the preference shares are made "**preferential as to capital**," they are paid off equally with the ordinary shares on the winding-up of the company.

Welton v. Saffery, [1897] A. C. 299, at p. 309

The original shares were issued to the directors only. Later more shares were issued as "ordinary," "discount," and "bonus" shares. The "discount" shares were issued at a discount, the bonus shares for nothing. These, of course, had to be paid up in full, but the holders contended that they need only pay up sufficient to pay off the debts, and need not pay the rest of the amount due on their shares for the purpose of making an equal division among the shareholders :—**Held**, the company could have issued shares if it liked, which, **after the debts had been paid**, should be paid in full before any other shares ; but the company had not done so. Therefore the whole capital must be paid up, and the surplus, after paying off the debts, divided equally among the shareholders.

If, however, the preference shares are made "preferential as to capital," any surplus assets (g) of the company after payment of debts will (apart from special provisions in the articles (h)) be applied first in paying off the capital of the preference shares.

The question whether the preference shareholders have then any further rights in the capital depends on the terms of the Articles. But where the Articles merely give preferential rights as to dividends and in the winding-up, the right of the preference shareholders to

(f) And see *Aduir v. Old Bushmills Distillery Co.*, [1908] W. N. 24.

(g) As to the meaning of "surplus assets," see *Re Ramel Syndicate, Ltd.*, [1911] 1 Ch. 749.

(h) As in *Re W. J. Hall & Co., Ltd.*, [1909] 1 Ch. 521, where there were special provisions that arrears of dividend on the preference shares should be paid off first. And see *Re F. de Jong & Co., Ltd.*, [1946] Ch. 211 ; [1946] 1 All E. R. 556.

participate with the other shareholders in any surplus assets is not excluded (i).

Overrears of dividend cannot be paid up to the date of the winding-up unless such dividends have in fact been declared, or unless the Articles contain express provisions to this effect or upon their true construction give the preference shareholders a clear right to the dividend (l).

Redeemable preference shares.—As a rule, a company cannot pay back the capital subscribed by the shareholders without the sanction of the Court; but a company can, if the Articles so provide, issue preference shares on the terms that they may be redeemed out of profits or out of a fresh issue of shares. No shares can be so redeemed unless they are fully paid.

Where shares are so redeemed out of profits, a sum equal to the nominal value of the shares redeemed must be transferred to "The capital redemption reserve fund." Any premium paid on redemption must be paid out of profits.

Where redeemable preference shares have been issued, every balance sheet must contain a statement specifying what part of the capital consists of such shares and the earliest date on which the company has power to redeem the shares (m).

(i) *Re William Metcalfe & Sons, Ltd.*, [1933] Ch. 142. This, being a decision of the Court of Appeal, overrules earlier cases which laid down a contrary proposition. A doubt, however, still remains whether this decision does not conflict with the principles laid down in the House of Lords in *Will v. United Lankat Plantations Co., Ltd.*, [1914] A. C. 11.

(k) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86. *Re New Chinese Antimony Co., Ltd.*, [1916] 2 Ch. 115. *Re Springbok Agricultural Estates, Ltd.*, [1920] 1 Ch. 563. *Re Roberts and Cooper, Ltd.*, [1929] 2 Ch. 383.

(l) *Re Waller Symons, Ltd.*, [1934] Ch. 308. *Re Catalinas Warehouses and Mole Co.*, [1947], 1 All E. R. 51.

(m) Companies Act, Sched. VIII., 2 (a).

The redemption of redeemable preference shares is not to be taken as reducing the amount of the company's authorised share capital (*n*).

Shares already issued cannot be converted into redeemable preference shares (*o*).

Guarantee of dividends.—A third party may guarantee the dividends on preference shares. If he is called upon to pay, he cannot claim repayment from the company as a creditor; but he may stand in the place of the holders of preference shares to be recouped out of any dividends subsequently becoming payable to the holders of preference shares for the period in respect of which he was called upon to pay (*p*).

2. Ordinary shares.—Generally the greater part of the net profits of the company, after paying the fixed dividend on the preference shares (if any), is paid as dividend on the ordinary shares.

As to how such dividends are paid, see Chapter X.

3. Deferred shares or founders' shares.—These shares are usually entitled to a proportion of the profits if the dividend on the ordinary shares amounts to more than a fixed amount, *e.g.* the deferred shares may be entitled to half the profits after a dividend of ten per cent. has been paid on the ordinary shares.

Deferred shares are usually taken by the promoters. Sometimes they are allotted to them as fully paid up in consideration of their bearing the expenses of promotion, or they may be issued in satisfaction of amounts due for underwriting commission to persons who

(*n*) Companies Act, s. 58 (3). This overrules the decision in *Re Serpell & Co., Ltd.*, [1944] Ch. 233.

(*o*) *Re St. James' Court Estate, Ltd.*, [1944], Ch. 6.

(*p*) *Re Walters' Deed of Guarantee, Walters "Palm" Toffee, Ltd., v. Walters*, [1933] Ch. 321.

subscribe for ordinary shares. In either of these cases a contract or particulars of a contract must be delivered to the registrar for registration (*q*), and the number of founders' shares must be stated in the prospectus or statement in lieu of prospectus (*r*).

Reserve capital.—A company may by special resolution declare that any portion of its capital, which has not been already called up, shall not be capable of being called up except in the event of and for the purpose of the company being wound up (*s*).

That is, reserve capital is capital which cannot be called in except on winding up.

Reserve capital cannot be turned into ordinary capital without leave of the court, and it cannot be dealt with or charged by the directors.

Re Mayfair Property Co., Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28

The company by special resolution declared that £5 out of each £10 share should be reserve capital. The company then issued debentures charging its undertaking and property, including its uncalled capital:—**Held**, the reserve capital of £5 per share was not charged, and the debenture holders had not therefore a first claim upon it.

5. Stock.—When shares have been fully paid up (*t*), they may be turned into stock (*u*). Stock is not divided into equal parts or shares, and the divisions are not numbered, but it may be divided into any amounts. Thus it would be possible to hold £10 6s. 8d. of stock, though the shares had originally been £100 shares.

It may be either (1) registered stock.

(*q*) See p. 76. (*r*) See p. 52. (*s*) Companies Act, s. 60.

(*t*) If stock is issued as partly paid up, the issue is void. *Re Home and Foreign Investment and Agency Co., Ltd.*, [1912] 1 Ch. 72.

(*u*) Must be given to the Registrar (Companies Act, s. 61).

Then a register of stockholders is kept, and stock certificates, similar in form to share certificates, are granted, and the stock is transferred by similar transfers, and the dividends are paid in the same way as in the case of shares.

Or (2) unregistered stock.

Then share warrants are issued to the holders, and these are transferable on delivery.

Stockholders are members of the company, and can vote at meetings, but if the stock is unregistered, they must prove their right to the stock before voting, and share warrants cannot be used as a qualification for a director (*iii*).

The difference between shares and stock is explained by LORD CAIRNS in *Morrice v. Aylmer* (1874), 10 Ch. App. 148, at p. 154 :

"The use of the term 'stock' merely denotes that the company have recognised the fact of the complete payment of the shares, and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that the . . . meetings shall be of persons entitled to this stock who meet and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock."

And it was there held that a bequest of shares in a company would include stock (*v*).

SECTION 2

Increase and Alteration of Capital

A company may increase its capital if authorised to do so by its articles (*w*). This must be done by resolution of the company in **general meeting** (*x*). The articles may authorise the increase of capital by any form of resolution of the company, ordinary, extraordinary, or

(*iii*) Companies Act s. 182 (2).

(*v*) But a direction in a will to invest in preference stock does not justify investment in preference shares. *Re Willis, Spencer v. Willis*, 2 Ch. 563.

(*w*) Companies Act, s. 61.

(*x*) *Ibid.*, s. 61 (2).

special. (Increase thus differs from reduction of capital, which must be by special resolution, confirmed by the court.) Before the Act of 1929 the company might delegate the power to increase capital to the directors (*y*). But this did not authorise the directors to issue the new shares, unless the articles so provided (*a*).

Since the Act of 1929 the power to increase capital must be exercised by the company in general meeting and cannot be delegated to the directors (*x*).

Notice of any increase of capital must be given to the Registrar within fifteen days after the passing of the resolution (*b*).

If the regulations do not authorise the company to increase or alter its capital, it may alter its articles by special resolution and give itself the power to do so (*c*).

The new capital may consist of preference, ordinary or deferred shares, provided there is nothing in the Memorandum to prevent it. If there is, it may be possible to alter the Memorandum (*d*).

The nominal capital of a company may be increased though it has not yet issued all its authorised capital; but usually the increase is made because the company has issued all its authorised capital and requires more funds, *e.g.* to extend its business. Thus, the capital may be increased from £20,000 in 2,000 ordinary shares of £10 each, by the addition of £30,000 in 30,000 seven per cent. preference shares of £1 each.

(*x*) Companies Act, s. 61 (2) re-enacting s. 50 of 1929.

(*y*) *Mosely v. Koffyfontein Mines, Ltd.*, [1910] 2 Ch. 382.

(*a*) S. C. [1911], A. C. 409.

(*b*) Companies Act, s. 63.

(*c*) The alteration of the articles and of the capital may be effected by one resolution: *Re Bank of Hindustan, China and Japan, Campbell's Case* (1873), L. R. 9 Ch. App. 1, at p. 21.

(*d*) See p. 117, *ante*.

Stamp duty at the rate of 10s. per £100 (*e*) is payable on the amount by which the nominal capital of the company is increased (*f*).

Capital may also be altered in other ways, by resolution of the company in general meeting, as when shares are **consolidated**,

e.g. every twenty 1s. shares are turned into one £1 share.

Or **sub-divided**.

e.g. every £1 share is turned into twenty 1s. shares. This can be done, provided the proportions of the amounts paid and unpaid remain the same.

On sub-division of shares, preferential rights may be attached to one part of each old share; *e.g.* each old share may be divided into one preference share and one deferred share.

Capital may also be altered by being **re-organised**, *i.e.* by altering the rights of the holders of different classes of shares (*g*) as follows:—

(1) If this involves an alteration of the Memorandum (*h*), it must be done in the manner described on p. 117, *ante*, or by means of a scheme of arrangement sanctioned by the court (*i*).

(*e*) Finance Act, 1933 (23 & 24 Geo. 5, c. 19), s. 41.

(*f*) *A.-G. v. Anglo-Argentine Tramways Co., Ltd.*, [1909] 1 K. B. 677.

(*g*) As to what are different classes, see *Re United Provident Assurance Co., Ltd.*, [1910] 2 Ch. 477, and see S. C., [1911] W. N. 40, as to procedure when one class has voted against the proposals and subsequently votes for them.

(*h*) *e.g.*, where the Memorandum divides the capital into preference and ordinary shares, or where it imposes a limit on the amount of dividends payable. *Re Garden Village (Hull), Ltd.*, [1923] 1 Ch. 230.

(*i*) See pp. 287, 288 *post*, and *Re Nordberg J. A., Ltd.*, [1915] 2 Ch. 439; *Re Schweppes, Ltd.*, [1914] 1 Ch. 322.

(2) If it does not involve any alteration of the memorandum, it may be done by special resolution without the sanction of the court (*k*).

SECTION 3

Reduction and Diminution of Capital

Where some of the capital of the company has been lost, it may be doubtful how far the company ought to pay dividends out of its profits without making provision for this loss. If the loss is very great, this might make it difficult for the company to pay dividends at all: consequently the company is given power to reduce its capital, that is, to write off the lost capital and pay dividends without regard to this loss.

A company may reduce its capital by special resolution confirmed by the court, if its articles contain power to do so (*l*). This can be done

- (1) by reducing the liability of members for uncalled capital;
- (2) by writing off lost capital;
- (3) by paying off capital which is in excess of the wants of the company, or
- (4) in any other way whatever which may be approved by the court.

It is not sufficient that the Memorandum contains power to reduce, unless the Articles provide for it also (*Re Dexine Patent Packing and Rubber Co.*, (1903), 88 L. T. 791). If they do not, they must be altered by special resolution, and this must be effected before the special resolution reducing the capital can be passed (*Re Patent Invert Sugar Co.* (1885), 31 Ch. D. 166).

(*k*) *Re Australian Estates and Mortgage Co., Ltd.*, [1910] 1 Ch. 414.

(*l*) Companies Act, s. 66; and see *Poole v. National Bank of China Ltd.*, [1907] A. C. 229.

The following case is an example of the way in which capital may be altered and reduced by leave of the court :

Re Welsbach Incandescent Gas Light Co., Ltd., [1904]
1 Ch. 87

By the Memorandum, the capital was to be £3,500,000 divided into—

- (1) £5 five per cent. cumulative preference shares ;
- (2) £1 ordinary shares to be paid seven per cent. after (1) ;
- (3) £1 deferred shares to be paid seven per cent. after (2) ;

and the rights of the different classes might be modified by special resolution—

More than £2,000,000 of the capital was lost.

A special resolution was passed that the capital be reduced to £1,345,000 divided into—

- (1) preference shares of 13s. each ;
- (2) ordinary shares of 5s. each ;
- (3) deferred shares of 1s. each ;

(i.e. each £1 ordinary share became a 5s. share, etc.).

Then by a special resolution all these were turned into stock, and each £2 of stock was re-converted into one £1 six per cent. preference share, and one £1 ordinary share :—**Held**, resolution confirmed : the court being satisfied that the £2,000,000 had been really lost, and that the scheme was fair and reasonable.

One form of reduction is an “ **all round reduction** ” ; i.e. the lost capital is written off all the shares in proportion to the nominal value : but it may be written off one class of shares and not off others.

Re Quebrada Railway Land and Copper Co. (1889),
40 Ch. D. 363

The company lost some capital, and passed a resolution to write it all off the ordinary shares, and not to touch the preference shares :—**Held**, resolution confirmed ; but only after full notice of the effect of this resolution had been given to all the shareholders.

Neither form of reduction will be allowed if it is unfair to any class of shareholders.

Re Barrow Haematite Steel Co., [1900] 2 Ch. 846

The capital was divided into preference and ordinary shares. The preference shares had no preference as to capital, and no voting power. No dividends had ever been paid on the ordinary shares. A resolution was passed to reduce the capital by one-quarter all round :—**Held**, this was not fair on the preference shareholders. Resolution not confirmed.

Reduction of capital has been confirmed—

- (i) Though the voting power was thereby altered (*m*).
- (ii) Under a scheme by which some shareholders were to take debenture stock instead of their shares (*n*).
- (iii) By cancelling stock (*o*).

The court may order the reasons for reduction to be advertised (*p*).

A forfeiture of shares may, unless the shares are re-issued involve a reduction of capital. This appears to be the only case in which a reduction of capital can take place without the leave of the court.

Form of proceedings to obtain the sanction of the court. The special resolution is first passed. Then the company must apply to the court to confirm the resolution. The application must be made by petition (*q*).

If the order is made, and the reduction confirmed, the order must be advertised, and the Court may order the words "and reduced" to be added to the name of the company for a short period, if there are special reasons for doing so (*r*).

If the reduction involves a return of capital or a reduction of liability for uncalled capital, an inquiry is ordered as to the debts and liabilities of the

(*m*) *Re Colner (James), Ltd.*, [1897] 1 Ch. 524.

(*n*) *Re Thos. de la Rue & Co., Ltd. and Reduced* [1911] 2 Ch. 361.

(*o*) *Re House Property and Investment Co., Ltd.*, (1912), 106 L. T. 949.

(*p*) Companies Act, s. 68. *Re Truman, Hanbury, Buxton & Co., Ltd.*, [1910], 2 Ch. 498.

(*q*) R.S.C. Order LIIIb, r. 5 (*d*).

(*r*) Companies Act, s. 68 (2) and (3).

company by means of advertisements, and a list of creditors is settled by the court. All the creditors must consent or be paid off.

The court can in a proper case dispense with the advertisements and settling the list of creditors (s).

If the reduction does **not involve a return of capital or reduction of liability**, no enquiry for creditors is necessary.

Where capital is reduced on the ground that it has been lost, evidence should be given to prove the loss (t).

The County Court has jurisdiction to sanction the reduction if the paid-up capital is not more than £10,000, but the High Court has also jurisdiction in such a case (u).

Debenture-holders are not entitled to object to the reduction if there is no return of capital to the shareholders and no reduction of their liability (v).

Capital may be "**diminished**" by cancelling shares which have not been taken up or agreed to be taken up by any person. This may, if the articles so provide, be done by an ordinary resolution (w). It is not technically a reduction of capital though it does reduce the amount of the nominal capital (x). *On 13/1/56*

(s) Companies Act, s. 67 (3).

(t) *Caldwell v. Caldwell & Co., Ltd.*, [1916] W. N. 70.

(u) Companies Act, s. 218 (3), and *Re Portsmouth and District Vacuum Cleaner Co.*, [1908] W. N. 203.

(v) *Re Meux's Brewery Co.*, [1919] 1 Ch. 28.

(w) Companies Act, s. 61 (1) (e).

(x) Companies Act, s. 61 (3).

CHAPTER X

DIVIDENDS

DIVIDENDS are the profits of trading divided among the members in proportion to their shares, and in accordance with their rights as shareholders.

The proportion may be determined by agreement in the Articles ; if not, dividends are paid on each share in proportion to the nominal value of that share, without reference to the amount paid up on it.

Oakbank Oil Co. v. Crum (1882), 8 App. Cas. 65

The capital was divided into 40,000 £1 shares fully paid up, and 20,000 £1 shares with 5s. only paid up. A dividend was declared in proportion to the amount paid up on the shares :—**Held**, this could not be done.

The Articles therefore sometimes provide that the dividends shall be paid to the shareholders “in proportion to the amounts paid up on the shares held by them respectively.”

The dividends in each year on the ordinary shares vary with the amount of the profits made by the company ; but the dividends on the preference shares are usually at a fixed rate.

The power to pay dividends is not expressly given by the Companies Act, but it is inherent in every trading company, and it need not be given by the Memorandum.

The mode of payment of dividends is determined by the Articles. These generally provide that dividends are to be paid by the directors with the sanction of a general meeting and may be paid by cheque or warrant sent by post to the registered address of each shareholder.

If so, the posting of the warrant amounts to payment, and if the warrant is lost, the shareholder's remedy is to sue upon the lost warrant (*a*).

Interim Dividends.—The articles usually provide that the directors may pay interim dividends.

An interim dividend is a dividend declared at any time between two annual general meetings (*b*).

The declaration of a dividend creates a debt (*c*) from the company to each shareholder, for which he is entitled to sue.

Re Severn and Wye and Severn Bridge Rail Co.,
[1896] 1 Ch. 559

R. held shares in the company upon which dividends were declared from 1832 to 1873. These dividends were never claimed or paid. In 1896, the question arose whether the right to the dividends was barred:—**Held**, when a company declares a dividend, a debt immediately becomes payable to each share-holder, for which he can sue at law, and the Statute of Limitations immediately begins to run.

The debt is in the nature of a specialty debt, and is not barred until twelve years have elapsed (*d*).

The most important rules as to payment of dividends are (1) dividends should only be paid out of

(*a*) *Thairlwall v. Great Northern Rail. Co.*, [1910] 2 K. B. 509

(*b*) *Re Jowitt, Jowitt v. Keeling*, [1922] 2 Ch. 442.

(*c*) As between tenant for life and remainderman dividends may be apportioned (*Re Oppenheimer, Oppenheimer v. Boatman*, [1907] 1 Ch. 399).

(*d*) *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796, Limitation Act, 1939.

profits (e), and (2) dividends cannot be paid out of capital (f).

Where, however, shares are issued for raising money to be spent on the construction of works, the company may pay interest on the capital so raised, though no profits are earned, if the payment is (1) authorised by the Articles, (2) sanctioned by the Board of Trade, and (3) not more than 4 per cent. or such other rate as is prescribed by order of the Treasury (g).

Difficulties may arise in determining in any particular case whether the dividends have really been paid out of capital or not.

Thus, suppose a company has some freehold premises which are increasing in value, and leasehold premises which are decreasing, and the business of the company is to buy and sell coal: and suppose the accounts of the company for the last two years show the following result:

	For 1946	For 1947
	£	£
(1) Leaseholds worth	10,000	8,000
(2) Freeholds worth	10,000	11,000
(3) Stock of coal worth	10,000	5,000
(4) Excess of receipts for coal over cost of coal bought ..	5,000	15,000

Disregarding (1), (2), and (3), the profits for 1947 would appear to be £15,000. But this is obviously too much, for the stock of coal has been lessened by £5,000, and this should be deducted. Also the leasehold and freehold premises together are worth £1,000 less than in the previous year, and this £1,000 ought to be taken into account in estimating the profit for the year. But there appears to be no legal necessity to deduct the £1,000.

The capital account and the revenue account must be kept separate.

(e) As to the meaning of "profits," see *Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92.

(f) *Re Sharpe, Masonic General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154.

(g) Companies Act, s. 65 (1).

A distinction must be drawn between—

- (1) “**Circulating capital**,” *i.e.* “property acquired or produced with a view to re-sale or sale at a profit” (*e.g.* the coal in this case), and
- (2) “**Fixed capital**,” *i.e.* “property acquired and intended for retention and employment with a view to profit” (*h*) (*e.g.* the leaseholds and freeholds above).

Both legally and commercially any loss of circulating capital must be accounted for before the profits are ascertained.

Commercially also any loss or depreciation of “**fixed capital**” should be taken into account, and this is generally done by means of writing off a certain proportion of the value in each year ; but legally there are many cases in which profits may be paid away as dividends without providing for loss or depreciation of fixed capital. Any improvement or appreciation of fixed capital may, however, be counted as profit.

The following cases show the extent of the rule :

Lee v. Neuchatel Asphalte Co. (1889), 41 Ch. D. 1

The company was formed to take over a concession to work asphalte, originally granted in 1867 for twenty years, but extended in 1878 to 1907. The concession was paid for by 100,000 shares and £8,000 in cash. The accounts of 1885 showed a surplus of £17,000. The directors proposed to pay away in dividends £16,000 of this, without making any allowance for the fact that the concession was running out :—**Held**, (1) the assets had not depreciated (owing to the renewed concession, they were more valuable than when the company was formed) ; (2) the company was not bound to make up in available assets the whole of its nominal share capital, before paying dividends ; (3) the directors were not bound to set aside a sinking fund.

(*h*) See the definitions in *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266, at p. 286.

The next case carries the rule further :

Verner v. General and Commercial Investment Trust,
[1894] 2 Ch. 239

The Company was formed to purchase investments and to borrow and lend money and pay the profits as dividends. In 1894, the receipts exceeded the expenditure by £23,000 ; but many of the investments had deteriorated, making a loss on the value of the assets of £250,000 :—Held, " the statutes do not expressly prohibit payment of dividends out of capital, but their provisions are wholly inconsistent with the return of capital to shareholders." The dividend may, however, be paid in this case. There is no legal liability to have even a sinking fund.

Note that in this case the investments were intended to be retained, and it seems only reasonable that a company should not be bound to meet every depreciation of its investments before paying dividends ; for such depreciation may often be only temporary.

Had the business of this company consisted of speculating in investments, the investments would have been circulating capital, and any loss must have been accounted for.

These cases were followed in *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266 ; *Lawrence v. West Somerset Mineral Railway*, [1918] 2 Ch. 250 ; and *Stapley v. Read Brothers, Ltd.*, [1924] 2 Ch. 1. Their effect is explained with a warning in—

Bond v. Barrow Haematite Steel Co., [1902]
1 Ch. 353

A smelting company lost £200,000 owing to a lease of certain mines of iron ore becoming useless through flooding, and £50,000 owing to depreciation of its property generally : Held, *Verner's Case* does not lay down a general rule that in every company fixed capital may be sunk or lost ; but that there are companies in which this may be done. The £200,000 loss is a loss of circulating capital, there being no difference, in this case, between mines of ore and a stock of ore.

As to the £50,000 loss, the burden of proof is on the directors to show (1) that it is fixed capital and (2) that in a company of this nature such fixed capital may be sunk.

Lee v. Neuchatel Asphalte Co. is not an authority for stating that no company owning depreciating property need ever create a depreciation fund.

The result of these cases is, that it is usually legal, but not altogether safe, for directors to pay away profits as dividends without making any provision for making good loss of fixed capital.

The balance sheet ought to be made out on sound business lines. The proper way is to take the facts as they stand, estimate the value of the property and the profits made or losses sustained as compared with the previous year, and strike the balance. If this is done *bona fide*, the dividend will not be fraudulent, even if some of the property was in fact valued too high.

Re National Bank of Wales, Ltd., [1899] 2 Ch. 629, at p. 670 ; affirmed *sub nom* *Dovey v. Cory*, [1901] A. C. 477

Bad debts were included in the balance-sheet as assets : if these had been written off, no dividend could have been paid. The defendant director relied on the statements of the manager that the debts were good :—Held, a director is not liable if he acts on the advice of a person to whom matters of detail have been properly delegated, and whom he believes to be capable and honest. The defendant was not liable.

If the directors do pay dividends out of capital, they may be sued for the whole amount of the dividend actually paid out of capital. But they may recover from each shareholder the dividend received by him, if he knew that it was paid out of capital ; and a shareholder who took the dividend with such knowledge cannot sue the directors (*i*) ; but this would not prevent him from obtaining an injunction to restrain the future payment

(*i*) *Towers v. African Tug Co.*, [1904] 1 Ch. 558.

of dividends out of capital or other illegal acts in the future (*k*).

As to accretions.—Any increase in the value of the assets may be paid out as dividend (*l*).

Lubbock v. British Bank of South America, [1892]
2 Ch. 198

The company had part of its undertaking in Brazil with a capital of £500,000. It sold this part for £875,000 and agreed not to carry on a similar business. Later, the company paid £75,000 to be released from this agreement, so that the net profit on the sale (after various other payments) was £205,000:—**Held**, this may be distributed as profit. (The judgment of CHITTY, J., at pp. 200, 201 should be read as to the mode of taking accounts.)

The whole accounts for the year must be taken into account.

Foster v. New Trinidad Lake Asphalt Co., Ltd.,
[1901] 1 Ch. 208

The company had bought up an old company: among the assets were promissory notes for \$127,000 which were treated in the balance sheet as a bad debt and of no value. The notes were unexpectedly paid up in full. The directors proposed to distribute \$100,000 of this as profit.—**Held**, "the question of what is profits depends on the whole accounts fairly taken for the year, capital as well as profit and loss, and although dividends may be paid out of earned profits in proper cases though there has been a depreciation of capital, an estimated accretion in value of one item cannot be deemed to be profits without reference to the whole accounts fairly taken."

On the whole, in practice, business principles are generally followed.

(*k*) *Mosely v. Koffyfontein Mines, Ltd.*, [1911] 1 Ch. 73.

(*l*) *Re Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92. But, unless the increase has been realised by sale of the assets, it is dangerous to take it into account in distributing profits, unless it is clearly proved to be a permanent increase in value.

Profits paid to a reserve fund remain profits and may be paid as dividends though there is a loss on capital (*n*). But not a reserve fund representing premiums on shares issued at a premium.

Sums received by way of premium are to be transferred to "the share premium account" and the provisions of the Acts as to reduction of capital are to apply, as if the account were part of the paid up share capital.

The amount of the share premium account will accordingly appear as part of the paid up capital in the balance sheet.

The share premium account may be applied in paying up shares to be issued to members as fully paid bonus shares, or in writing off preliminary expenses or commissions paid on the issue of shares or debentures or in providing any premium paid on the redemption of redeemable preference shares (*n*).

Shareholders cannot insist on the payment of dividends, even where the profits are amply sufficient, if the directors decline to declare a dividend, except in case of fraud (*o*).

Dividends must be paid in cash unless there is an express agreement to accept shares or debentures, etc.

Hoole v. Great Western Rail. Co. (1867), 3 Ch. App. 262

The company had made profits, but had no available cash, and proposed to give the shareholders fully-paid shares instead :—Held, the shareholders are entitled to claim payment in cash.

Capitalisation of profits.—Companies frequently "capitalise" profits by issuing fully paid shares to the

(*m*) *Re Hoare & Co., Ltd. and Reduced*, [1904] 2 Ch. 208, at p. 213. But see *Re Tilt Cove Copper Co.*, [1913] 2 Ch. 588, as to the right of debenture holders to intervene.

(*n*) Companies Act, s. 56, re-enacting s. 72 of 1947.

(*o*) *Bond v. Barrow Haematite Steel Co.*, [1902] 1 Ch. 353.

shareholders. This can be done, provided it is authorised by the articles and there are sufficient undistributed profits available; for though a company cannot issue "bonus" shares for which the shareholders subscribe nothing, it can, if its Articles so provide, declare a dividend or bonus out of its undistributed profits, and at the same time issue a corresponding number of new shares; and it can apply the dividend or bonus, which then belongs to the shareholders, in paying up in full the shares issued to them.

Sometimes the shares are issued as "bonus" shares without these steps being taken. If so, the issue can be justified on the ground that the company has only done directly what it could have done in a roundabout way (*p*).

The effect of capitalisation is that the company does not part with any of its assets; but each shareholder gets a larger number of shares.

Shares and even debentures of the company distributed in this way have been held not to be income and not liable to sur-tax (*q*); but if shares in another Company are distributed, sur-tax is payable (*r*), and a "bonus" paid in cash out of the income of the company is simply a dividend under another name (*s*). If, however, the company declares a capital bonus out of profits which arise from the sale of capital assets, the bonus may be capital (*t*).

(*p*) *Swan Brewery Co., Ltd. v. R.*, [1914] A. C. 231, at p. 236; *Inland Revenue Commissioners v. Wright*, [1927] 1 K. B. 333, at p. 348, 349, and see Art. 128 of Table A.

(*q*) Formerly "super-tax": *Inland Revenue Commissioners v. Blott*, [1921] 2 A. C. 171; *Inland Revenue Commissioners v. Fisher's Executors*, [1926] A. C. 395.

(*r*) *Pool v. Guadian Investment Trust Co.*, [1922] 1 K. B. 347.

(*s*) *Re Bates, Mountain v. Bates*, [1928] Ch. 682.

(*t*) See *Gimson v. Inland Revenue Commissioners*, [1930] 2 K. B. 246. Explained in *Neumann v. Inland Revenue Commissioners*, [1934] A. C. 215. But see *Re Doughty, Burridge v. Doughty*, [1947] Ch. 263, disapproving *Re Ward's Will Trusts, Ringland v. Ward*, [1936] Ch. 704.

Bonus distributions are now subject to a ten per cent. tax (*u*).

When shares are transferred at or near the time of a declaration of dividend, the agreement usually specifies whether the transferee or the transferor shall get the benefit of the dividend. If the transferee is to get the dividend, the transfer is said to be "**cum dividend**," if not, "**ex dividend**."

If there is no agreement as to dividends, the buyer is entitled to all dividends declared after the date of the agreement for sale.

Black v. Homersham (1878), 4 Ex. D. 24

August 1st, sale of shares by auction ; by the conditions of sale the transfer was to be completed on August 29th. August 24th, dividends declared. August 29th, transfer completed :—**Held**, the dividends belong to the buyer. Completion relates back to the time when the purchase was made. The buyer bought the shares on that day at their then value.

Where a company which is under the control of not more than five persons does not distribute a reasonable amount of its profits among the members, the members may be assessed to sur-tax on the amount not distributed (*v*).

(*u*) Finance Act, 1947, s. 60.

(*v*) Finance Act, 1922 (12 & 13 Geo. 5 c. 17) s. 21, as amended by the Finance Acts, 1927, s. 31, 1936, s. 19, and 1937, s. 14.

CHAPTER XI

BORROWING POWERS

Every trading company has an implied power to borrow money for the purpose of its trading ; but where the company has a share capital and has issued a prospectus, this power cannot be exercised until the minimum subscription has been allotted (*a*), and, where there is no prospectus, until a statement in lieu of prospectus has been registered (*a*).

If a company has power to borrow, it has also power to charge its property as security for payment of the loan.

General Auction, Estate and Monetary Co. v. Smith,
[1891] 3 Ch. 432

The company was formed for the purchase and sale of estates, to accept loans on deposit and make advances. The Memorandum contained no power to borrow. The company borrowed on the security of some of its land in order to pay back a deposit:—**Held**, being a trading company, it had full power to borrow and charge its property.

The borrowing powers of a trading company are generally exercised by the directors, but this depends on the Articles.

Other companies have no power to borrow unless the Memorandum of Association gives them power to do so.

Sometimes the Memorandum limits the power to borrow. If necessary the memorandum can be altered (see pp. 28-33, *ante*).

(*a*) And the company has otherwise complied with the Companies Act, s. 109.

e.g. the Memorandum may provide that the company may not borrow more than two-thirds of its paid-up capital.

If a company borrows beyond its powers, the borrowing is *ultra vires* and void, and the securities given are void, and the lender cannot sue the company for the return of the loan : but

- (1) If the money has not been spent, he can get an injunction to prevent the company from parting with it ; or
- (2) He may have an action against the directors on an implied warranty of authority ;

Weeks v. Propert (1873), L. R. 8 C. P. 427

A railway company had fully exercised its borrowing powers. The directors advertised for money to be lent on the security of debentures. W. lent £500 and received a debenture. The debenture was declared void :—**Held**, he could sue the directors for breach of warranty, implied from the prospectus, that they had power to issue such debentures.

Or

- (3) If it has been used to pay off debts which could have been enforced against the company, the lender may sue the company, being subrogated to the rights of the creditors who were paid off.

The principle is that a company which borrows to pay off existing debts does not thereby increase its liabilities (*b*).

Neath Building Society v. Luce (1889), 43 Ch. D. 158

A building society became indebted to some of its members for principal and interest due on a mortgage. It borrowed money, *ultra vires*, to pay off principal and interest :—**Held**, the lenders had a good loan, as they were subrogated to the rights of the creditors paid off.

(*b*) *Harris Calculating Machine Co., Sumner v. Harris Calculating Machine Co.*, [1914] 1 Ch. 920.

But this subrogation does not give the lenders any priority that the original creditors may have had over the other creditors of the company.

Re Wrexham, Mold and Connah's Quay Rail Co.,
[1899] 1 Ch. 440

The railway company had borrowed up to the full extent of its powers, the loans being secured by A., B. and C. debentures—the A. debentures had priority over the B. and C. debentures. A bank advanced money to pay off the interest on the A. debentures, and then claimed to stand in the place of the A. debenture holders and to be repaid their loan before the B. or C. debentures were paid:—**Held**, when a company borrows money, *ultra vires*, the lender so far as the money is applied in discharging the legal debts of the company, is entitled to have the loan **treated as valid**, but not to have a charge in priority to the other creditors.

A company may charge its **uncalled capital** if the Memorandum or Articles allow it, or if they contain words wide enough to cover it.

Newton v. Anglo-Australian Investment Co.'s
Debenture-Holders, [1895] A. C. 244

The Memorandum gave power to borrow "on any security of the company" (c):—**Held**, these words authorise a charge on the uncalled capital.

But the use of the word "property" in the instrument creating the charge, is not enough to charge the uncalled capital.

Re Russian Spratts Patent, Ltd., Johnson v. Russian
Spratts Patent, Ltd., [1898] 2 Ch. 149

The company had power to borrow and charge its uncalled capital. It issued debentures charging its "undertaking and all to property which it now is or shall at any time become

(c) These appear to have been the words upon which the decision turned, and not the further words, "upon the security of any property of the company:" see *Re British Provident Life and Fire Assurance Society, Stanley's Case* (1864), 4 De G. J. & Sm. 407; *Re Streatham and General Estates Co.*, [1897] 1 Ch. 15.

entitled " :—Held, this did not create a charge on the uncalled capital.

A mortgage of uncalled capital is usually enforced by the appointment of a receiver (see pp. 176, 177) and by an order of the Court giving the receiver power to use the name of the liquidator for the purpose of making calls (*d*).

A company cannot borrow on the security of its reserve capital (see p. 122), nor of its books, for they must be kept at the office of the company and be open for inspection. If, therefore, the company charges all its undertaking, the liquidator, on a winding-up, has a better right to the books than the receiver appointed by debenture-holders (*Engel v. South Metropolitan Brewing and Bottling Co.*, [1892] 1 Ch. 442).

Money borrowed by a company may be secured by any one of the following securities or by several of them at once :

(1) **A legal mortgage of specific parts of its property.**

A company can mortgage its freehold or leasehold property in the same way as an ordinary person ; but such mortgages **must be registered**—

(a) On the register kept by the company.

Every company must keep a register of mortgages specifically affecting property of the company and all floating charges, with a description of the property charged, the amount of the charge, and the names of the mortgagees (*e*).

Failure to register under this section does not make the mortgage void (*f*).

(*d*) *Re Westminster Syndicate, Ltd.* (1908), 99 L. T. 924.

(*e*) Companies Act, s. 104.

(*f*) *Wright v. Horton* (1887), 12 App. Cas. 371 : penalty £50.

(b) On the register kept by the Registrar, but only if it is for one or more of the purposes mentioned on p. 164 (g).

Non-registration under this section makes the security void.

(2) An equitable mortgage by deposit of title deeds.

This must be registered on the company's register, and if it is for any of the purposes mentioned on p. 164, it must be accompanied by some writing to be delivered to the Registrar for registration under s. 95.

(3) A mortgage of chattels.

This must usually be registered on the company's register and with the Registrar; for by section 95 of the Companies Act any mortgage created by an instrument which, if executed by an individual, would be a bill of sale, must be registered; and a mortgage of chattels by an individual is almost always a bill of sale under the Bills of Sales Act, 1882 (h).

(4) Bonds are covenants under seal to pay money. They are sometimes issued without security.

(5) Promissory notes and bills of exchange.

These may be made or accepted on behalf of the company by any person having its authority (i), and if the company has on a fair construction of its Memorandum power to do so (h).

(6) A floating charge evidenced by debentures (see Chap. XII).

(7) Debenture Stock (see p. 145).

(g) Companies Act, s. 95.

(h) See 41 & 42 Vict. c. 31, s. 4.

(i) Companies Act, s. 33.

(k) *Peruvian Rail. Co. v. Thames and Mersey Marine Insurance Co., Re Peruvian Rail. Co.* (1867), L. R. 2 Ch. App. 617, 623.

CHAPTER XII

DEBENTURES

SECTION 1

Debentures and Debenture Stock

A **debenture** is a document given by a company as evidence of a charge created by the company, usually in return for a loan.

The word has been used to cover many things, but it generally means one of a series of documents described as debentures all ranking *pari passu*, by each of which a company promises to pay a fixed sum and interest, and charges all its property present and future.

Debentures are stated by s. 455 of the Companies Act to include debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not.

The term may include stock which is not charged on any property (a) and a single mortgage made by a company may be a "debenture" (b).

Debenture stock.—Some difficulty is often felt in attempting to distinguish between debentures and debenture stock; but the difficulty arises from trying to contrast an instrument securing a debt with a debt itself of another nature, and from the fact that the word

(a) *Lemon v. Austin Friars Investment Trust, Ltd.*, [1926] Ch. 1.

(b) *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] A. C. 613.

" debenture " is often used loosely as referring to the debt secured by debentures. In other words, as in the case of a debenture, there is a debt due from the company secured or evidenced by a document called a **debenture**, so in the case of debenture stock, there is an obligation or a debt due from the company called debenture stock, and secured or evidenced by a document called a **debenture stock certificate**.

Debenture stock is a debt or obligation, generally secured by a trust deed ; it is subdivisible, but otherwise is much the same as a debt secured by debentures.

The difference between a debt secured by debentures and debenture stock is very like the difference between shares and stock (c).

The liability of the company is regarded as a liability to pay an annuity rather than as a liability to repay a loan.

" The transaction . . . is one of sale and purchase of an annual sum with a superadded right on the part of the purchaser to have, in certain defined events, a lump sum, . . . paid to him in lieu of further annual payments " (RIGBY, L. J., [1899] 1 Q. B., p. 138).

The phrase "**mortgage debentures**" is only another name for **debentures** creating a charge on the property of the company ; but the Stock Exchange objects to an instrument being called a **mortgage debenture** unless it is secured by a trust deed. This is frequently done. See pp. 159 and 160.

There are several kinds of debentures, of which the most usual are—

- (1) Debentures payable to registered holder ;
- (2) Debentures payable to bearer.

(c) A bequest of debentures will carry debenture stock (*Re Herring, Murray v. Herring*, [1908] 2 Ch. 493, at p. 498).

SECTION 2

Debentures Payable to Registered Holder

The following is a common form of **debenture payable to registered holder** :

(Registered with the Registrar of Companies, 24th May, 1947.)

BLANK, LIMITED

Registered office :

Debenture

No. 175

£100.

1. Blank, Limited (hereinafter called " the company "), will, on the 1st day of January, 1960, or on such earlier day as the principal money hereby secured becomes payable in accordance with the conditions endorsed hereon, pay to , of , or other the registered holder hereof for the time being, his executors, administrators, or assigns, the sum of one hundred pounds.

2. The company will in the meantime pay to such registered holder interest thereon at the rate of five per centum per annum, by half-yearly payments on the first day of July and the first day of January in each year, the first of such half-yearly payments to be made on the 1st day of July next.

3. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

4. This debenture is issued subject to the conditions endorsed hereon, which are to be deemed part of it.

Given under the common seal of the company this 19th day of May, 1947.

(Seal.)

The common seal of the company was affixed hereto in the presence of

} Directors.
, Secretary.

THE CONDITIONS BEFORE REFERRED TO.

1. This debenture is one of a series of debentures issued or to be issued by the company for securing principal sums not exceeding in the aggregate the sum of £100,000. The debentures of the said series are all to rank *pari passu* as a first charge on the property hereby charged, without any priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on any of its property and assets in priority to the said debentures.

2. A register of the debentures will be kept at the company's registered office, wherein will be entered the names, addresses, and descriptions of the registered holders, and particulars of the debentures held by them respectively. The said register will at all reasonable times during business hours be open to the inspection of the registered holder thereof or his legal personal representative.

3. The registered holder or his legal personal representative will be deemed to be exclusively entitled to the benefit of this debenture, and the company and all persons may act accordingly. The company shall not be bound to enter in the register notice of or in any way to recognise any trust or the right of any person other than the registered holder to any benefit under this debenture, save as herein provided.

* * * * *

5. Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his executors or administrators. The instrument of transfer must be delivered at the registered office of the company, duly stamped, with a fee of two shillings and sixpence and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered, and note of such registration endorsed hereon.

6. No transfer will be registered during the seven days immediately preceding the days by this debenture fixed for payment of interest.

7. In the case of joint registered holders the principal money and interest hereby secured will be deemed to be owing to them upon a joint account.

8. The principal money and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for such principal money and interest shall be a good discharge to the company.

9. The company may at any time give notice in writing to the registered holder hereof, his executors or administrators, of its intention to pay off this debenture, and upon the expiration of one month from such notice being given the principal money hereby secured shall become payable.

10. The principal money hereby secured shall immediately become payable—

- (a) If the company make default for a period of three months in the payment of any interest hereby secured, and the registered holder hereof, after the expiration of the said period of three months, and before such interest is paid, by notice in writing to the company call in such principal money.
- (b) If a distress or execution be levied or sued out upon or against any of the property and assets of the company, and be not paid out within seven days.
- (c) If an order be made or an effective resolution be passed for the winding up of the company.
- (d) If a receiver of the property and assets of the company be appointed by any court of competent jurisdiction.

11. The principal money and interest hereby secured will be paid at the company's bankers for the time being or at the registered office of the company.

12. A notice may be served by the company upon the holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address.

13. Any notice served by post shall be deemed to have been served at the expiration of twenty-four hours after it was posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

14. At any time after the principal money hereby secured becomes payable, the registered holder of this debenture may by writing under his hand appoint any person or persons to be a receiver or receivers of the property hereby charged.

Any receiver so appointed shall have power—

- (1) To get in and take possession of all or any of the property hereby charged.
- (2) To carry on the business of the company.
- (3) To sell any of the property hereby charged.
- (4) To make any arrangement or compromise which he shall consider to be in the interests of the debenture holders.

A receiver so appointed shall be deemed to be the agent of the company, and the company shall be solely responsible for his acts or defaults and for his remuneration. The provisions of sects. 101, subsects. (1) and (2), 104, 106, 107 and 109, subsects. (3), (4), (6), (7), and (8) of the Law of Property Act, 1925, and the powers thereby conferred on a mortgagee or receiver shall, so far as applicable, apply to the receiver so appointed as if such provisions were incorporated herein, save that all moneys received by such receiver, after providing for the matters specified in clauses (i) to (iii) of sect. 109, subsect. (8) aforesaid and for all costs, charges, and expenses of or incidental to the exercise of any of the powers of such receiver, shall be applied in or towards satisfaction *pari passu* of the debentures.

15. The registered holder shall have the benefit of the trust deed dated, etc., and made, between the company and A. and B. as trustees for the debenture-holders.

As to the form.—Debentures need not be by deed (*d*), but, if not, the consideration must be stated. They may be, and often are, accompanied by a trust deed charging specific property of the company by a legal mortgage or legal charge in favour of trustees for the debenture holders. Sometimes they create a charge over specific property only.

The date fixed for repayment of the capital is generally five, ten or twenty years after the issue, or they may be

(*d*) *Re Fireproof Doors Ltd., Umney v. Fireproof Doors, Ltd.*, 1916] 2 Ch. 142, at p. 150.

payable on demand (e) ; or they may be **perpetual**. If so, the capital money only becomes payable if any of the things specified in condition 10 should happen.

Debentures could always be made "perpetual" in the sense that there need not be any time fixed within which the company was *bound* to pay them off ; but a company could not before 1908, in the exercise of its borrowing powers, issue perpetual debentures in the sense that the company **could never pay them off** without the consent of the debenture-holder (f) ; but now—

a condition in any debentures making the debentures irredeemable is not void (g).

The word "irredeemable," if strictly construed, means that the company must never pay off the debentures ; but the context may show that it means that the debenture holder can never demand payment (h).

The interest on debentures is a debt, and may be paid out of capital (i).

As to condition 1.—" *Pari passu* " means that all the debentures of this series are to be paid ratably, so that, if there is not enough to go round, they shall all abate proportionally.

(e) If payable "on or after" a fixed date, this means "payable on demand after" that date. The prospectus cannot be referred to for the purpose of explaining the debenture. *Re Tewkesbury Gas Co., Tysoe v. Tewkesbury Gas Co.*, [1911] 2 Ch. 279 ; affirmed, [1912] 1 Ch. 1. But, as between the company and the original applicants, the prospectus may contain a collateral agreement. *Jacobs v. Batavia and General Plantations Trust*, [1924] 2 Ch. 329.

(f) *Southern Brazilian Rio Grande Do Sul Rail. Co., Ltd.*, [1905] 2 Ch. 78. An express power to grant perpetual annuities or to issue irredeemable debenture stock might however have been valid.

(g) Companies Act, s. 89.

(h) *Re Stocks (Joseph) & Co., Ltd., Willey v. Stocks (Joseph) & Co., Ltd.* (1909), [1912] 2 Ch. 134 n. (note).

(i) And may be so treated in the accounts (*Hinds v. Buenos Ayres Grand National Tramways Co., Ltd.*, [1906] 2 Ch. 654).

Re Midland Express, Ltd., Pearson v. Midland Express, Ltd., [1913] 1 Ch. 499

The company had issued £100,000 of debentures payable "pari passu." One of the debenture holders commenced an action to realise the security, and the usual judgment was made in June, 1912, directing enquiries as to the amounts due to the debenture holders. The interest on some of the debentures had been paid down to 1906, but on others not since 1902.

In July, 1912, the master made his certificate of the amount then due for principal and interest to each debenture holder.

The net assets amounted to £12,464. It was claimed that this sum must be applied first in equalising the arrears of interest:—**Held**, the £12,464 must be divided among the debenture holders in proportion to the amount found due to them for capital and interest at the date of the master's certificate.

If the words "pari passu" were not put in, the debentures would be payable according to the date of issue, or, if they were all issued on the same day, then according to numerical order (*Gartside v. Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762: see below).

If these words are put in, a debenture-holder who seeks to enforce his security must sue on behalf of himself and all other debenture-holders of the same series. But he may take other steps against the company to get his own debt paid without consulting the interests of the others, provided he does not attack any specific asset of the company.

The company cannot create a new series to rank *pari passu* with the old series, unless power to do so is expressly reserved.

Gartside v. Silkstone and Dodworth Coal and Iron Co. (1882), 21 Ch. D. 762

150 debentures for £100 each were issued on the same day, numbered 501–650. On Nos. 501–600 it was stated that the issue was for £10,000 to be paid *pari passu*. On

Nos. 601-650 it was stated that the issue was for £5,000 to be paid "*pari passu*":—**Held**, the 100 must be paid before the 50. The presumption is that deeds are executed according to their dates, and in this case (the date being the same) according to their numbers; and you cannot look outside the deeds themselves to prove that this was not so. (N.B.—If the first deeds had contained power to issue another £5,000 *pari passu* with the first issue, the presumption might have been rebutted from the deeds themselves.)

"Floating charge."—This means that the assets of the company are charged with the payment of the debt, but the company may deal with any of its assets in the ordinary course of business, until the charge becomes a fixed charge. This happens when the money becomes payable under condition 10 (p. 149), and the debenture holder takes some steps to enforce his security. The charge is then said to "**crystallise.**"

Re Panama, New Zealand and Australian Royal Mail Co. (1870), 5 Ch. App. 318

The company charged its "**undertaking**":—**Held**, this is a good charge. "The word '**undertaking**' necessarily infers that the company will go on, and that the debenture-holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for payment of his principal, and that was unpaid."

The characteristics of a floating charge were stated by **SIR ROBERT ROMER, L. J.**, in—

**Re Yorkshire Woolcombers' Association, Ltd.,
Houldsworth v. Yorkshire Woolcombers'
Association, Ltd.**, [1903] 2 Ch. 284

The company gave a charge over its book debts, present and future:—**Held**, any mortgage by a company which contains the three following characteristics is a floating charge:

(1) It is a charge on a class of assets, present and future

- (2) That class is one which, in the ordinary course of business, would be changing from time to time; and
- (3) It is contemplated that until some steps are taken, the company shall carry on its business in the usual way.

Unless otherwise agreed, this leaves the company free to make specific mortgages of its property having priority over the floating charge.

Governments Stock and other Securities Investment Co. v. Manila Rail. Co., [1897] A. C. 81

The debentures created a floating charge. Three months' interest became due, but the debenture-holders took no steps. The company then made a mortgage of a specific part of its property:—**Held**, the mortgage has priority. The debentures remained merely a floating security until the debenture-holders took some steps to enforce their security (*k*).

In fact the company can deal with its property in any way authorised by its Memorandum of association so long as its remains a going concern (*l*).

e.g. it may assign the rents of land which is subject to a floating charge (*m*).

It has been held that a company may even sell its whole undertaking if that is one of its objects specified in the Memorandum (*n*).

A floating charge is also liable to be postponed to the rights of the following persons if they act before the debenture-holders take steps to enforce their

(*k*) See *Cox-Moore v. Peruvian Corporation, Ltd.*, [1908] 1 Ch. 604.

(*l*) *Governments Stock and other Securities Investment Co. v. Manila Rail. Co.*, [1897] A. C. 81.

(*m*) *Re Ind, Coope & Co., Ltd.*, *Fisher v. Ind, Coope & Co., Ltd.*, [1911] 2 Ch. 223. But otherwise if the land is specifically charged.

(*n*) *Re Borax Co.*, *Foster v. Borax Co.*, [1901] 1 Ch. 326; but as to such a sale, see *Bisgood v. Henderson's Transvaal, Ltd.* [1908] 1 Ch. 743.

security (*o*), *e.g.* by the appointment of a receiver in Court or out of Court (*p*).

(1) A landlord who distrains for rent (*Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; *Re South Rhondda Colliery Co. (1898), Ltd.*, [1928] W. N. 126).

(2) A creditor who gets a garnishee order absolute (*Robson v. Smith*, [1895] 2 Ch. 118) (*q*).

(3) A judgment creditor, if the goods are seized and sold by the sheriff or the debt is paid to the sheriff to avoid a sale (*r*) before the debenture-holder takes steps.

But if the goods are not sold, the floating charge has priority.

Davey & Co. v. Williamson & Sons, [1898] 2 Q. B. 194

The debentures created a floating charge. Goods of the company were seized by the sheriff under a *fi. fa.* Then the debenture holders for the first time took steps to enforce their security, and claimed priority:—**Held**, the debentures have priority: the debentures being a valid charge, the company had no interest in the property available to satisfy a judgment debt. Seizure of goods by the sheriff is not a dealing with the assets in the ordinary way of business.

(Note that, when the goods are sold under the *fi. fa.* they become the property of the purchaser.)

Rates and taxes and wages due to a clerk or servant and other debts entitled to preferential payment on a winding-up also have priority over debentures which create only a floating charge (*s*).

(*o*) A mere demand for payment is not sufficient to crystallise the charge. *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K. B. 979.

(*p*) *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K. B. 979, at pp. 987, 1001.

(*q*) But not a garnishee order *nisi* (*Norton v. Yates*, [1906] 1 K. B. 112).

(*r*) *Heaton and Dugard, Ltd. v. Cutting Brothers, Ltd.*, [1925] 1 K. B. 655.

(*s*) See pp. 299, 300 and Companies Act, ss. 94 and 319.

A floating charge created within twelve months of a winding-up is void in certain cases. See pp. 307 and 308.

A person who has supplied goods to the company under a hire purchase agreement on the terms that they are to remain the property of the lender until paid for in full, has priority over the debentures (*t*).

A clause is frequently inserted in the debentures that the company shall not be able to create mortgages in priority to or *pari passu* with the debentures of that issue; but even then a person who takes a mortgage without notice of the debenture gets priority, even by an equitable mortgage by deposit, if he has no notice of this provision in the debenture.

Re Valletort Sanitary Steam Laundry Co., Ltd., Ward v. Valletort Sanitary Steam Laundry Co., Ltd., [1903] 2 Ch. 654

The debentures created a floating charge, and contained a provision that the company were not to create any prior charge. The manager forgot this, and deposited deeds with a bank as security. The bank held some of these debentures on deposit for a customer:—Held—

- (1) The bank had not constructive notice of the debentures;
- (2) The bank had priority (*a*).

Where the company buys land and some of the purchase money is allowed to remain on mortgage (*b*)

(*t*) *Re Morrison, Jones and Taylor, Ltd., Cooke v Morrison, Jones and Taylor, Ltd.*, [1914] 1 Ch. 50. In this case the hire purchase agreement was made before the debentures were issued; but the person who supplied the chattels would probably have the same priority if the hire purchase agreement were made after the issue of the debentures, if the debentures contained only a floating charge. *Wilson v. Kelland*, [1910] 2 Ch. 306; *Re Connolly Brothers, Ltd.* (No. 2), *Wood v. Connolly Brothers, Ltd.* [1912] 2 Ch. 25; *Re Morrison, Jones and Taylor, Ltd., Cooke v. Morrison, Jones and Taylor, Ltd.*, [1914] 1 Ch. at p. 55.

(*a*) And see *Cox-Moore v. Peruvian Corporation, Ltd.*, [1908] 1 Ch. 604.

(*b*) *Wilson v. Kelland*, [1910] 2 Ch. 306.

or is lent by some person who takes a charge (c), the charge of the debenture-holders is subject to the charge in favour of the seller or lender.

An express power to create mortgages ranking in priority to a floating charge does not authorise the issue of a new floating charge in priority to the first (d).

In case a debenture-holder owes a debt to the company which cannot pay its debentures in full, he cannot set off his debt against the debenture. The rule is that a person claiming a share of a fund must first pay up everything he owes to the fund (*Re Brown and Gregory, Ltd., Shepherd v. Brown and Gregory, Ltd.*, [1904] 1 Ch. 627; *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149).

The equitable rules against clogging the equity of redemption may apply to a floating charge. But a debenture, or even a mortgage of a company, is not affected by the rule merely because the date of redemption is postponed for a long time or even indefinitely, since a debenture may be perpetual (f).

As to conditions 3 and 8.—The effect of these clauses is that the company **may** disregard any notice of equities attaching to the debentures.

Societe Generale De Paris v. Walker (1885), 11 App. Cas. 20, at p. 30

The Articles contained a clause similar to conditions 3 and 8 above:—**Held**, "there was no obligation on this company to accept or to preserve any record or notice of

(c) *Connolly Brothers, Ltd.* (No. 2), [1912] 2 Ch. 25.

(d) *Re Cope (Benjamin) & Sons, Ltd., Marshall v. Cope (Benjamin) & Sons, Ltd.*, [1914] 1 Ch. 800.

(e) *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.*, [1914] A. C. 25, at p. 41; but see *De Beers Consolidated Mines, Ltd., v. British South Africa Co.*, [1912] A. C. 52, and *Cuban Land Co.*, [1921] 2 Ch. 147.

(f) *Knightsbridge Estates Trust, Ltd., v. Byrne*, [1940] A. C. 613. Companies Act, s. 89.

equitable interests or trusts if actually given or tendered to them, and that any such notice if given would be absolutely inoperative to affect the company with any trust."

But the company need **not** disregard equities, and if the company has equitable claims against the debenture-holder, it may refuse to register the transfer (*Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743).

If a condition to this effect was not inserted, a debenture, being a chose in action, would be assignable subject to all equities.

Athenæum Life Assurance Society v. Pooley (1858),
3 De G. & J. 294

Debentures were issued to P. under an agreement which was a fraud on the company. P. sold them to L., who had no notice of these facts:—**Held**, L., though a *bona fide* purchaser for value without notice, being only a purchaser of a chose of action, must take it subject to the equities attaching to it. Therefore L. cannot sue on the debentures (g).

As to condition 5 (p. 148).—The object of requiring all transfers to be delivered to the company, is to secure that the company shall have all the relevant documents in its possession in case of a dispute as to the title to any debentures.

As to condition 10 (p. 149).—The effect is that if there is undue delay in payment of the interest or if the security becomes endangered, the debenture-holder can immediately take proceedings to recover his money.

As to condition 11.—The place of payment may be important. If no place of payment is fixed, the company must find the debenture-holder and pay him (h). A

(g) This was before the Judicature Act, 1875 (36 & 37 Vict. c. 66), s. 25 (6), but choses in actions are assignable subject to equities under that Act; and see *Re Rhodesia Goldfields, Ltd.*, *Partridge v. Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239.

(h) *Fowler v. Midland Electric Corporation for Power Distribution, Ltd.*, [1917] 1 Ch. 527, at p. 532.

demand for payment at the place specified in the conditions is not necessary before proceedings are commenced (i).

The proper method of payment and the currency in which the capital and interest are payable depend on the law of the place where payment is to be made (k).

As to condition 14.—The debenture-holders can always get a receiver appointed by the court if a proper case has arisen, whether or not this clause is inserted. The object of the clause is to enable them to appoint a receiver themselves without applying to the court. (See pp. 176, 177.)

As to condition 15 (p. 150). The advantages of having a trust deed are :

- (1) If the company makes default, the trustees are there, ready to take the necessary steps, instead of leaving it to the initiative of some debenture-holder.
- (2) The trustees may be given power to sell and thus to realise the security without the aid of the court.
- (3) A legal estate is vested in the trustees and, where necessary, the mortgage or charge is registered. This prevents a subsequent legal mortgagee from getting priority.
- (4) The company can be made to insure, etc., by covenants in the deed.

(i) *Harris Calculating Machine Co., Summer v. Harris Calculating Machine Co.*, [1914] 1 Ch. 920.

(k) *Adelaide Electrical Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A. C. 122; *Auckland Corporation v. Alliance Assurance Co., Ltd.*, [1937] A. C. 587, at p. 606. As to the effect of a "gold clause," see *Feist v. Societe Intercommunale Belge, D'Electricite* [1934] A. C. 161; *R. v. International Trustees for Protection of Bondholders Aktiengesellschaft*, [1937] A. C. 500.

Form of the deed (l).—The deed usually contains the following provisions :—

(1) A lease or “ demise ” of the freeholds, and a sub-demise of the leaseholds, to the trustees for a term of years, or a registered charge in case of registered title.

(2) A floating charge over the rest of the assets of the company.

(3) The company is to retain possession until it makes default in payment of interest, etc. ; then the trustees are to enter and sell.

(4) Power to the trustees to sell or exchange any of the above-mentioned properties of the company at the request of the company.

(5) Power to the trustees to convene meetings of debenture-holders, etc.

(6) Covenants by the company to insure, repair, etc.

(7) Provisions for remuneration of the trustees.

(8) Provisions for the release of trustees from liability

Any provision in a trust deed is now void so far as it would have the effect of exempting a trustee from, or indemnifying him against, liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the powers and discretions conferred on him by the deed.

But this does not prevent a release given after the event or a provision in the trust deed enabling a release to be given by agreement of a majority of not less than three-fourths in value of the debenture holders present at a meeting summoned for that purpose (m).

(l) As to the stamp on a debenture trust deed, see *Suffield (Lord) v. Inland Revenue Commissioners*, [1908] 1 K. B. 865.

(m) Companies Act, 88.

As to (1).—This gives the trustees a legal mortgage of the freeholds and leaseholds, and these cannot be sold or dealt with without the trustees' consent.

As to (5).—Debentures sometimes contain a clause that the rights of the debenture-holders may be modified with the consent of a majority of (say) three-fourths of them, and that this consent shall bind all the debenture-holders (*Sneath v. Valley Gold Co., Ltd.*, [1893] 1 Ch. 477). The modification may provide for postponement of payment of principal or of interest (*n*) or for any other alteration of the rights of the debenture holders, provided it is not unfair or oppressive (*o*), or obtained by a bribe or a special advantage given to some of the debenture holders (*p*).

As to (7).—The remuneration of the trustees is usually a first charge on the assets (*q*); it usually continues to be payable "during the continuance of the security"; but it is better to add "notwithstanding the appointment of a receiver" (*r*).

SECTION 3

Debentures to Bearer

The object of making a debenture payable to bearer is that it may become a negotiable instrument, that is to say:

- (1) It is transferable by delivery.
- (2) A transferee in due course gets a title independent of any defects in the title of the transferor.

(*n*) *Northern Assurance Co., Ltd. v. Farnham United Breweries, Ltd.*, [1912] 2 Ch. 125, where redeemable debentures were made "irredeemable."

(*o*) *Goodfellow v. Nelson Line (Liverpool), Ltd.*, [1912] 2 Ch. 324 (alteration upheld). *Re New York Taxi-Cab Co., Ltd., Sequin v. New York Taxi-Cab Co., Ltd.*, [1913] 1 Ch. 1 (alteration held invalid).

(*p*) *British America Nickel Corporation v. O'Brien*, [1927] A. C. 369.

(*q*) *Re Piccadilly Hotel, Ltd., Paul v. Piccadilly Hotel, Ltd.*, [1911] 2 Ch. 534.

(*r*) See *British Consolidated Oil Corporation Ltd., Howell v. Bristol Consolidated Oil Corporation Ltd.*, [1919] 2 Ch. 81. not following *Re Locke and Smith Ltd., Wigan v. Locke and Smith, Ltd.*, [1914] 1 Ch. 687.

- (3) No notice of transfers need be given to the company.
- (4) No stamp duty is payable on a transfer.

As in the case of share warrants, the interest is payable to the bearer of a coupon, which is merely an order on the company or the company's bank to pay a certain sum to the person who presents it on or after a certain date. Several coupons are attached to each debenture and are cut off by the holder one by one as the date for payment of each arrives.

Form of debentures to bearer.—The form is much the same as the form of a debenture to registered holder (on p. 147), except that the agreement is to pay "to the bearer on presentation of this debenture" and to pay interest "in accordance with the coupons annexed hereto."

The conditions indorsed on the debenture contain some of the same clauses, but omit all reference to a register or registered holder, and also contain the following clauses :

- (1) Interest shall be payable only to the person producing the coupon.
- (2) When the principal sum due is paid off, the debenture and coupons must be surrendered.
- (3) The company may safely pay interest to the bearer of the coupon.
- (4) Notice affecting the holders (*e.g.* of intention to pay off) may be given by advertisement.
- (5) The debenture is to be treated as negotiable.
- (6) On the request of the holder, the company will exchange his debenture for a debenture to registered holder.

Debentures payable to bearer are negotiable.—There was at one time some doubt as to this, for at common law an instrument **under seal** could not be negotiable (*Crouch v. Credit Foncier of England* (1873),

L. R. 8 Q. B. 374). But it was held that in the case of a foreign instrument under seal, if it was treated by the general custom of merchants as being negotiable, it would be recognised as such by English law (*Goodwin v. Roberts* (1875), L. R. 10 Ex. 337). It is now settled that the latter doctrine applies also to English documents even though under seal.

Bechuanaland Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658

The plaintiffs held debentures of an English company, payable to bearer and under the seal of the company. The plaintiffs kept them in a safe of which their secretary had the key. The secretary pledged the debentures with the defendant bank as security for a loan. The bank took them *bona fide*, having recently received from the plaintiffs an assurance that their secretary was absolutely trustworthy :—**Held**, the debentures are negotiable. The defendants have a good title.

Bearer debentures are now recognised as negotiable without the necessity of proving a custom of merchants to treat them as such.

Edelstein v. Schuler & Co., [1902] 2 K. B. 144

Debenture bonds, payable to bearer, were stolen and sold through a broker :—**Held** (BIGHAM, J.), "The time has passed when the negotiability of bearer bonds, whether government bonds or trading bonds, foreign or English, can be called in question. The existence of the usage has been so often proved that it must be taken to be part of the law."

SECTION 4

Registration of Debentures

Debentures or other mortgages made by limited companies need not be registered as bills of sale, even if they include chattels, for, by the Bills of Sale Act, 1882, s. 17, debentures of "any mortgage, loan, or other incorporated company" (s) need not be registered.

(s) This includes a company registered in Guernsey (*Clark v. Balm, Hill & Co.*, [1908] 1 K. B. 667).

Re Standard Manufacturing Co., [1891] 1 Ch. 627

It was argued that the debentures of a company must be registered as bills of sale, unless it was a **mortgage or loan** company or some similar company, *i.e.* that the words "other company" must be construed *ejusdem generis* :—**Held**, the section applies to *all* incorporated companies.

The reason is that sufficient provision is made in the Companies Act for the registration of debentures.

Debentures or mortgages made by companies need not be registered as land charges under the Land Charges Act, 1925 (ss).

Debentures must be registered under the Companies Act.

By sect. 95 every mortgage or charge of any of the following kinds created by the company after a specified date (t), so far as it creates a charge, is void (u) as against the liquidator and creditors of the company unless particulars of the charge are delivered to the registrar for registration within twenty-one days of its creation. The charges affected by this section are :

- (a) a charge for securing an issue of debentures ; or
- (b) a charge on uncalled capital ; or
- (c) a charge created by an instrument which if made by an individual would require registration as a bill of sale ; or

(ss) S.10 (5).

(t) This date was originally 1st January, 1901, but now, if created after July 1st, 1908, (a), (b), (c), (d), (e) and (f) apply. If created after the commencement of the Act of 1929, (g), (h) and (i) also apply.

(u) See as to the effect of this *Dublin City Distillery, Ltd., v. Doherty*, [1914] A. C. 823.

- (d) a charge on land except a charge for rent or other periodical sum issuing out of land (a) ; or
- (e) a charge on book debts (b) ; or
- (f) a floating charge (c) ; or
- (g) a charge on calls made but not paid ; or
- (h) a charge on a ship or a share in a ship ; or
- (i) a charge on goodwill, patents, trade marks or copyright.

By sect. 97, when a company acquires property which is already subject to a charge, it must send to the registrar particulars of the charge and a copy of the instrument creating it.

In case of a series of debentures the register states—

- (a) the total amount secured ;
- (b) dates of resolutions and deeds (if any) which created the charge ;
- (c) description of the property charged ; and
- (d) names of the trustees (if any) (sect. 95 (8)).

Besides the register kept by the registrar the company must :

- (1) keep a register of mortgages and charges specifically affecting the property of the company and floating charges (sect. 104) ;

(a) S. 95 (2) (d) in part re-enacting s. 89 of 1947. A deposit of title deeds, or any other equitable or implied charge should be registered. Thus, if a solicitor claims a lien over the deeds of a company for his costs, his lien should be registered. So also a contract for sale of land to a company should be registered if the vendor wishes to rely on his lien for unpaid purchase-money.

(b) Book debts are debts owing to the company and properly accounted for in the books of the company. *Dawson v. Isle*, [1906] 1 Ch. 633, at p. 639. A charge upon hire-purchase agreements is usually a charge on book debts. *Re Inglefield (George), Ltd.*, [1933] Ch. 1 and see *Re Kent and Sussex Sawmills, Ltd.*, [1947] Ch. 177.

(c) e.g. a trust deed to secure a bonus on debenture stock, charged on certain profits. *Hoare v. British Columbia Development Association*, (1912), 107 L. T. 602.

- (2) keep copies of all mortgages and charges which have to be registered with the registrar (s. 103).

The company usually keeps a register of debenture-holders ; but it is not bound to do so.

Right of Inspection

(1) The register kept by the registrar must be open to the inspection of any one on payment of a fee fixed by the Board of Trade (*d*).

(2) The register of mortgages kept by the company must be open to creditors and members of the company free, and to other persons on payment of not more than 1s. (*e*).

(3) The copies of mortgages registered with the registrar must be open to creditors and members free, but not to other persons (*e*).

(4) The register of debenture-holders (if any) must be open to registered debenture-holders and members of the company free, subject to any reasonable restrictions and to other persons on payment of a small fee. Any one may have a copy on payment of 6d. per 100 words.

The provisions as to the place where the register of members is to be kept (see p. 79, *ante*) also apply to the register of debenture-holders (*f*).

Shareholders and debenture-holders are also entitled to require a copy of the register of debenture-holders at 6d. per 100 words (*f*), and debenture-holders are entitled to require copies of the debenture trust deed, if any, for 1s. if printed, or if not at 6d. per 100 words (*g*).

Effect of Non-Registration.—If a mortgage or charge is not registered with the registrar, it is void as to the security, but the obligation to pay the debt remains (*h*).

A new mortgage made under the terms of a debenture

(*d*) Companies Act, s. 98 (1).

(*e*) *Ibid.*, s. 105.

(*f*) *Ibid.*, s. 86 (2).

(*g*) *Ibid.*, s. 87 (2).

(*h*) *Parkes Garage (Swadlincote), Ltd.*, [1929] 1 Ch. 139.

trust deed which does not increase the total amount secured, need not be registered (*i*).

Similarly, separate mortgages of ships to trustees for debenture-holders need not be registered (*k*).

The certificate of registration given by the registrar is conclusive (*l*).

The date when the charge or debentures are "created" seems to mean the date when the instrument was executed (*m*); but, in the case of debentures, not until some of the series have been issued.

Re Spiral Globe, Ltd. (No. 2), Watson v. Spiral Globe Ltd., [1902] 2 Ch. 209

August, 1900, the company resolved to issue 20 debentures and sealed them. September 24th, 1900, 10 debentures were issued to debenture-holders. January, 1901 the other 10 were issued:—Held, the debentures were created on September 24th, 1900, and did not require registration.

Where the trust deed was dated before 1901 and the debentures were issued after 1901, registration was held not to be required (*n*).

An agreement to issue debentures usually creates an equitable charge at once.

(1) If so, the agreement should be registered within 21 days (*o*).

(2) If not, *i.e.*, if it is merely an agreement to give a

(*i*) *Bristol United Breweries Co., Ltd., v. Abott*, [1908] 1 Ch. 279.

(*h*) *Cunard S.S. Co., Ltd., v. Hopwood*, [1908] 2 Ch. 564.

(*l*) *Re Yolland, Husson and Birkett, Ltd., Leicester v. Yolland, Husson and Birkett, Ltd.*, [1908] 1 Ch. 152.

(*m*) *Esberger & Son, Ltd., v. Capital and Counties Bank*, [1913] 2 Ch. 366.

(*n*) *Dublin City Distillery, Ltd. v. Doherty*, [1914] A. C. 823.

(*o*) The registration of a series of debentures may protect documents of the same series which owing to some technical defect can only be upheld as agreements for debentures. See *Re Fireproof Doors, Ltd., Umney v. Fireproof Doors, Ltd.*, [1916] 2 Ch. 142.

charge in the future, it need not be registered (*p*).

But such a transaction is open to suspicion (*Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467) ; and if the charge is created within 6 months before the winding-up, it may be void as a fraudulent preference or (if within 12 months) it may be invalidated under sect. 322 (see pp. 307, 308).

If debentures are not registered within the proper time, a judge may order the time for registration to be extended, provided the default is accidental or due to inadvertence or some other sufficient cause or not such as to prejudice the position of creditors or shareholders, or on any other grounds which may be just and equitable (*q*).

The necessity for an application to the court can generally be avoided by cancelling debentures which have been issued without proper registration, and issuing new ones in their place (see *Defries (N.) & Co., Ltd.*, *Bowen v. Defries (N.) & Co., Ltd.*, [1904] 1 Ch. 37). But there is the risk that such debentures may be invalidated under s. 322 if the company is wound up within 12 months.

The order must be made "without prejudice to the rights of parties acquired prior to the time of actual registration (*r*)."

The effect of such a clause is not so great as appears at first sight ; for an ordinary unsecured creditor does not "acquire any rights" against the property of the company until the company commences to be wound up.

Thus—

(1) If the debentures are registered before a winding-

(*p*) *Re Loue (Gregory) & Co.*, *Francis v. Loue (Gregory) & Co.*, [1916] 1 Ch. 203.

(*q*) Companies Act, s. 101.

(*r*) *Re Spiral Globe, Ltd.*, [1902] 1 Ch. 396 ; *Re Johnson (I. C.) & Co., Ltd.*, [1902] 2 Ch. 101.

- up has commenced, the debenture-holders have priority over the unsecured creditors (s).
- (2) If the debentures are registered after a winding-up has commenced, the unsecured creditors rank equally with the debenture-holders (t).

But a subsequent incumbrancer, even *with notice*, has priority if registered before the date of the order (u).

The application may be made either by summons or by motion in the Chancery Division.

SECTION 5

Transfer of Debentures

Debentures to bearer are transferred by simple delivery.

Debentures to registered holder are transferred in the manner specified in the conditions indorsed thereon.

The company cannot register a transfer unless a proper instrument of transfer is produced (v).

The form is generally similar to a transfer of shares (see p. 94, *ante*). If no form is specified, they may be assigned, like any other chose in action, by writing signed, with written notice to the company.

Debentures are transferable, unless the contrary is agreed, subject to all equities, *e.g.*, after a resolution to wind up the company a shareholder can only assign his debentures subject to his liability for calls due on his shares.

(s) *Re Ehrmann Brothers, Ltd., Albert v. Ehrmann Brothers, Ltd.*, [1906] 2 Ch. 697. The consent of the principal creditor was required in *Herts and Essex Waterworks, Co., Ltd.*, [1909] W. N. 48; but see *Re M.I.G. Trust, Ltd.*, [1933] Ch. 542, at p. 569.

(t) *Re Anglo-Oriental Carpet Manufacturing Co.*, [1903] 1 Ch. 914.

(u) *Re Monolithic Building Co., Tacon v. Monolithic Building Co.*, [1915] 1 Ch. 643.

(v) Companies Act, s. 75.

Re China Steamship Co., Ex parte Mackenzie (1869),
L. R. 7 Eq. 240

Low held sixty shares in the company, and five debentures. The company was wound up, and Low assigned his debentures to M. Later, calls were made on the sixty shares :—**Held**, M. took the debentures subject to the company's claim for calls. And see *Athenæum Life Assurance Society v. Pooley* (1858), 3 De G. & J. 294.

But this is not so if the debentures are negotiable (see p. 162, *ante*), or if the debtor company has precluded itself from setting up such equities.

Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd., [1900]
2 Ch. 149

The debentures contained a clause that the principal and interest would be paid to any transferee without regard to the equities between the company and the transferor. A resolution was passed to wind up the company. C., a director, then transferred his debentures to R. C. had been guilty of misfeasance towards the company, but R. did not know this :—**Held**, R. takes, free from the company's claim against C.

But where the assignee is only a trustee for the assignor or his creditors, the company can enforce the equities against the transferee.

Re Brown and Gregory, Ltd., Shephard v. Brown and Gregory, Ltd., [1904] 1 Ch. 627

S. & Co. owed £1,666 to the company, but held debentures in the company. S. & Co. assigned all their property, including the debentures, to P. in trust for their creditors :—**Held**, P. takes the debentures subject to the company's right to insist on payment of the debt of £1,666 before paying the debt due from them and secured by the debentures.

A company can become a transferee of its own debentures (*w*).

(*w*) *Re Roulledge (George) & Sons, Ltd., Hummel v. Roulledge (George) & Sons, Ltd.*, [1904] 2 Ch. 474.

Debentures which have been redeemed may be re-issued (*x*), so as to rank *pari passu* with the original issue, unless

- (1) the articles provide otherwise ; or
- (2) the company is under a contract to redeem the debentures ; or
- (3) the company has done some act showing an intention to cancel the debentures (*a*).

Debentures redeemed under a contract to redeem them cannot be re-issued (*b*).

SECTION 6

Issue of Debentures (*c*)

Debentures (unlike shares) may be issued at a discount without any restrictions.

The reason is that they do not form part of the capital of the company.

Thus, suppose a company has tried to issue several £100 debentures with interest at four per cent., but they are not taken up ; there would be nothing to prevent the company issuing other debentures at five per cent. ; but nearly the same result is obtained by issuing each of the old £100 debentures for £80. The company will then have to pay £4 annually on each £80 lent, which amounts to £5 per cent. Besides this there is the gradual increase in the value of the debentures. Thus if they are to be paid in twenty years, the

(*x*) As to the effect of the re-issue on registration of the debentures see *Re New London and Suburban Omnibus Co., Appleyard v. New London and Suburban Omnibus Co.*, [1908] 1 Ch. 621.

(*a*) Companies Act, s. 90. Before 1929 the debentures could not be re-issued unless the company had purported to keep them alive.

(*b*) *Re Russian Petroleum and Liquid Fuel Co., Ltd., London Investment Trust, Ltd., v. Russian Petroleum and Liquid Fuel Co., Ltd.*, [1907] 2 Ch. 540.

(*c*) For the meaning of the term "issue" of debentures, see *Re Perth Electric Tramways, Ltd., Lyons v. Tramways Syndicate Ltd., and Perth Electric Tramways, Ltd.*, [1906] 2 Ch. 216, at p. 219.

capital value should increase by about £1 per year, thus in effect further increasing the rate of interest.

Re Regent's Canal Ironworks Co. (1876), 3 Ch. D. 43

The company issued 100 debentures of £100 each at £95 each. Forty of these were deposited with creditors as security :—**Held**, this was a good charge. The validity of the issue was not disputed (d).

On winding-up, the company's power to issue debentures ceases. But the company can allot the rest of a series already issued at any time before winding-up, even after an action has been commenced by debenture-holders to enforce their security.

Hubbard & Co., Ltd., Hubbard v. Hubbard & Co., Ltd. (1898), 68 L. J. Ch. 54

Some of the debentures of an issue were not taken up. The interest fell in arrear. The debenture-holders commenced an action for a receiver. The company allotted some of the remaining debentures of the series to its solicitor as security for the costs of the defence :—**Held**, the issue was good, as the receiver had not yet been appointed.

If the money is advanced to the company under an agreement that debentures shall be issued, this creates a charge at once in equity.

Pegge v. Neath and District Tramways Co., Ltd.
[1898] 1 Ch. 183

The company borrowed money from P. and gave him a promissory note, and undertook to issue to P., when called on, second mortgage debentures to that amount. An action was brought by the first and some of the second

(d) And see *Mosely v. Koffyfontein Mines, Ltd.*, [1904] 2Ch. 108.

debenture-holders to enforce their security, and they obtained judgment. Then P. claimed to have his second debentures issued to him:—**Held**, P. was in equity a holder of second mortgage debentures to the amount of his debt.

A debenture issued in an irregular manner may be treated as an agreement to give a debenture (*e*).

Specific performance of an agreement to give debentures may be enforced against a company: and the company can specifically enforce against another person an agreement to take debentures (*f*).

Before the Act of 1907 the latter agreement could not be specifically enforced, since, as a general rule, you cannot get specific performance of a contract to lend money (*g*).

SECTION 7

Remedies of Debenture-holders

A debenture-holder who wishes to realise his security and get his money back, may make use of all or any of the following remedies if the debenture held has become due or the security is in danger.

(1) He may sue on behalf of himself and all other debenture-holders to obtain payment or to **enforce his security by sale**. The court then appoints a receiver and (if necessary) a manager (see p. 182), and declares the debentures to be a charge on the assets of the

(*e*) *Re Fireproof Doors, Ltd., Umney v. Fireproof Doors, Ltd.*, [1916] 2 Ch. 142. An agreement to give a future contingent charge does not operate as an agreement to give a debenture. *Re Love (Gregory) & Co., Francis v. Love (Gregory) & Co.*, [1916] 1 Ch. 203.

(*f*) Companies Act, s. 92. But not if the company has forfeited the debentures for non-payment of instalments. *Kuala Pah Rubber Estates, Ltd., v. Mowbray* (1914), 111 L. T. 1072.

(*g*) *South African Territories, Ltd. v. Wallington*, [1898] A. C. 309.

company, directs inquiries as to who are debenture-holders, etc., and orders a sale of the property (*h*).

The holder of one of a series of debentures cannot sell the property charged, unless the debentures contain an express power of sale. *Blaker v. Herts. and Essex Waterworks Co.* (1889), 41 Ch. D. 399.

Any surplus of the proceeds of sale after payment of the principal, interest and costs due to debenture-holders is payable to the company (*i*).

2. He may **appoint a receiver**, if the conditions give him power to do so (see section 8, p. 176, *post*).

3. The debenture-holder may apply to the court for **foreclosure**, which may extend even to the uncalled capital of the company (*Sadler v. Worley*, [1894] 2 Ch. 170).

But this remedy is not usual, as it is necessary for all the debenture-holders of every class to be parties to the action.

Re Continental Oxygen Co., *Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511

Four out of five debenture-holders sued for foreclosure :—**Held**, where the legal estate is in the mortgagees and foreclosure means simply depriving the mortgagor of his equity of redemption, it is not necessary for all parties to

(*h*) **Note as to procedure.**—The company frequently consents to such an application ; if so, an order is made appointing a receiver, and later a sale is ordered on a motion for judgment (see *Re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.*, [1906] 1 Ch. 523). For this purpose a statement of claim should be prepared (*Re Dupont, Dupont v. Dupont, Ltd.* (1906), 50 Sol. Jo. 206), and should be supported by evidence. The statement of claim can only be dispensed with if the company consents to the order. (*Re Kitson Empire Lighting Co., Ltd., Higgs v. Kitson Empire Lighting Co., Ltd.*, [1910] W. N. 154). For the form of the order, see *Re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.*, (*ubi sup.*), and *Re Addressograph, Ltd., Backhouse v. Addressograph, Ltd.*, [1909] W. N. 260.

(*i*) As to the order of payment, see *Re Calgary and Medicine Hat Land Co., Ltd., Pigeon v. Calgary and Medicine Hat Land Co., Ltd.*, [1908] 2 Ch. 652.

be present : but where it involves conveying the property of the company to the mortgagees, they must all be present.

4. He can present a petition for winding up the company, as he is a creditor for the amount of his principal and interest (see p. 271) but not for any premium payable on redemption, unless the debenture expressly so provides (*k*).

5. He may have the property sold, if the debenture trust deed gives the trustees a power of sale.

6. If the company is insolvent, and his security is insufficient, he may value his security and prove for the balance of his debt or give up his security and prove for the whole debt.

The proceeds recovered by enforcing his security may be applied by the debenture-holder in payment of his costs, principal debt and interest up to date of payment (*l*). But if his security is insufficient, and the company is insolvent, he cannot prove for interest which became due after winding up ; nor can he get interest out of his security when arriving at a balance for which he can prove in the winding up (*m*).

A plaintiff who sues on behalf of himself and all other debenture-holders of the same class, has a first claim against the proceeds for his costs.

A second debenture-holder who is made a party gets his costs only out of the surplus (if any) after payment off of the first debentures (*n*).

(*k*) *Consolidated Goldfields of South Africa v. Simmer and Jack East, Ltd.* (1913), 82 L.J. (Ch.) 214.

(*l*) *Wallace v. Universal Automatic Co.*, [1894] 2 Ch. 547.

(*m*) *Re London, Windsor and Greenwich Hotels Co., Quartermaine's Case*, [1892] 1 Ch. 639, and see p. 298, *post*.

(*n*) *Re Clayton Engineering and Electrical Construction Co., Ltd.* (1904), 90 L. T. 283, except in special cases where he has rendered valuable services to the debenture-holders as a whole.

The amount of costs that the plaintiff may recover depends on a rule at first sight rather curious.

- (1) If the assets are **insufficient** to pay the debentures of his class in full, he gets solicitor and client costs.
- (2) If the assets are sufficient to pay the debentures of his class in full, but not sufficient to pay the subsequent debentures, he only gets party and party costs (*o*).

The reason of this is that in the first case the costs come entirely out of the pockets of the persons whose right he had been enforcing ; while in the second, they come out of the residue of the fund which is going to persons not benefited by his exertions (*p*).

SECTION 8

Receivers

A debenture-holder can appoint a receiver under the express power in his debenture (see condition 14 on p. 149, *ante*), or he can apply to the court (*q*).

The advantage of getting a receiver **appointed by the court** is that **any interference with him is a contempt of court**, and no proceedings can be

(*o*) But if the plaintiff cannot pay to his solicitor the difference between party and party costs and solicitor and client costs, the solicitor has a lien on the property recovered in the action for the difference (*Re Horne (W. C.) & Sons, Ltd., Horne v. Horne (W. C.) & Sons Ltd.*, [1906] 1 Ch. 271 ; and see form of order on p. 277).

(*p*) *Re New Zealand Midland Rail. Co., Smith v. Lubbock*, [1901] 2 Ch. 357 ; and see *Re Clayton Engineering and Electrical Construction Co., Ltd.* (1904), 90 L. T. 283.

(*q*) Notice of the appointment must be given to the Registrar within seven days. Companies Act, s. 102.

commenced against him or in respect of the property in his hands without leave of the court (r).

Re Metropolitan Amalgamated Estates, Ltd., Fairweather v. The Co., [1912] 2 Ch. 497

The company made a specific first mortgage of leaseholds. Later the company issued debentures charged on all its assets.

1st Feb. 1912. The mortgagee appointed a receiver under his mortgage deed, but did not give notice to the tenants of the leaseholds.

2nd Feb. A debenture-holder obtained the appointment of a receiver by the court.

The mortgagee was not a party to the action.

8th Feb. The mortgagee gave notice to the tenants of the appointment of his receiver.

27th Feb. The mortgagee gave notice of a motion to the court for leave to take the rents notwithstanding the appointment of the debenture-holder's receiver.

Rents were paid to the receiver between the 2nd Feb. and the 27th Feb.:—Held, these rents were properly paid to the receiver on behalf of the debenture-holder.

(Note.—When a receiver is appointed on the application of a second mortgagee, the order is usually made "without prejudice to the rights of prior incumbrancers." If these words had been added to the order in the above-stated case, the mortgagee would have been entitled to take the rents without applying to the court. *Underhay v. Read* (1887), 20 Q. B. D. 209).

One advantage of appointing a receiver under the powers given by the debenture is that he is in a better position if the company is wound up and a liquidator appointed.

(r) No proceedings can be taken against the receiver in any other action. *Re Maidstone Palace of Varieties, Ltd., Blair v. Maidstone Palace of Varieties, Ltd.*, [1909] 2 Ch. 283. As to proceedings by the debenture-holder against the company, see *Cleary v. Brazil Rail, Co.* (1915), 85 L. J. K. B. 32.

Pound (Henry), Son and Hutchins (1889), 42 Ch. D. 402

Debenture-holders were allowed to appoint a receiver (under a clause similar to clause 14 on p. 149) to take possession, although a liquidator had already been appointed.

But where a receiver has been appointed by the court, the court will usually put the liquidator in his place to act as both receiver and liquidator (*Re Stubbs (Joshua) Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475); but see *Re Karamelli and Barnett, Ltd.*, [1917] 1 Ch. 203. The court will sometimes replace a receiver appointed by one debenture-holder by a receiver appointed by the court; *Re Slogger Automatic Feeder Co., Ltd., Hoare v. Slogger Automatic Feeder Co., Ltd.*, [1915] 1 Ch. 478.

A company or other corporation cannot be appointed to act as a receiver (s), nor can an undischarged bankrupt (t).

Every invoice or business letter on which the name of the company appears after the appointment of a receiver must contain a statement that a receiver has been appointed (u).

A receiver appointed by the debenture-holders under a power in the debentures is the agent of the debenture-holders, and they are therefore liable on his contracts, unless the document conferring the power to appoint a receiver expressly states that he is to be the agent of the company. (*Robinson Printing Co., Ltd. v. Chic, Ltd.*, [1905] 2 Ch. 123.)

Note that in this respect he differs from a receiver appointed by an ordinary mortgagee under s. 101 of the Law of Property Act, 1925, for such a receiver is expressly declared by s. 109 (2) of that Act to be the agent of the mortgagor, and for this reason the receiver should be expressly declared to be the agent of the company by the conditions on the debenture (see condition 14 on p. 149).

(s) Companies Act, s. 366.

(t) *Ibid.*, 367.

(u) *Ibid.*, 370.

A condition which merely incorporated s. 24 of the Conveyancing Act, 1881, was held not to be sufficient for the purpose (a).

A receiver appointed by debenture-holders may now apply to the court for directions (b).

On a winding-up the receiver ceases to be the agent of the company, but he does not thereby become the agent of the debenture-holders (c). He is now personally liable on any contract entered into by him in the performance of his duties and is entitled to indemnity out of the assets (d).

A receiver appointed by the court is the agent of the court, and, as the court cannot be liable, the receiver so appointed has always been personally liable on his contracts, and entitled to be indemnified out of the assets of the company in priority to the rights of the debenture-holders (e).

A receiver appointed by the court is considered to have been appointed for the benefit of all persons interested in the assets.

He must not break contracts merely because he thinks this will suit the debenture-holders (f); but he is not bound to borrow money to perform contracts which can only be completed at a loss (g).

(a) *Deyes v. Wood*, [1911] 1 K. B. 806.

(b) Companies Act, s. 369.

(c) *Gosling v. Gaskell*, [1897] A. C. 575.

(d) Companies Act s. 369 (2).

(e) *Burl, Boulton and Hayward v. Bull*, [1895] 1 Q. B. 276; and *Re Glasdir Copper Mines, Ltd., English Electro-Metallurgical Co., Ltd., v. Glasdir Copper Mines, Ltd.*, [1906] 1 Ch. 365; and *Re London United Breweries, Ltd., Smith v. London United Breweries, Ltd.*, [1907] 2 Ch. 511.

(f) *Newdigate Colliery, Ltd., Newdigate v. Newdigate Colliery, Ltd.*, [1912] 1 Ch. 468.

(g) *Re Thames Ironworks, Shipbuilding and Engineering Co., Ltd., Farrer v. Thames Ironworks, Shipbuilding and Engineering Co., Ltd.*, (1912), 106 L. T. 674.

If the court has ordered the receiver to take proceedings, the plaintiff has no right to stop such proceedings, the question being in the discretion of the court (h).

The receiver cannot create a lien in favour of certain creditors without leave of the court (i).

Where a receiver or manager of all or substantially all the property of the company is appointed either under the powers of the debentures or the court on behalf of the holders of debentures secured by a floating charge, the receiver must send to the company, notice of his appointment forthwith and the company must within (usually) 14 days make out and submit to the receiver a statement as to its affairs.

Within two months after receiving this statement, the receiver must send to the Registrar and to the Court, if he was appointed by the court, a copy of the statement and any comments he sees fit to make and must send to the Registrar a summary of the statement and of his comments, and must send to the company a copy of his comments, and to the trustees and all the debenture-holders a copy of the summary.

The receiver must also within two months after the end of each year and within one month after he ceases to act as receiver or manager, send to the Registrar and to the trustees (if any) and the company and the debenture-holders, an abstract of his receipts and payments during the relevant period (k).

The statement must show particulars of the company's assets, debts, and liabilities, and particulars as to the creditors, and the securities held by them. The statement must be verified by affidavit of a director and the secretary, and past directors, employees and officers of the company and persons who have taken part in the formation of the company may in certain cases be required by the receiver to submit and verify the statement (l).

A receiver may be appointed by the court in a "debenture-holders' action" (commenced by one

(h) *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

(i) *Moss S.S. Co., Ltd. v. Whinney*, [1912] A.C. 254.

(k) Companies Act, s. 372.

(l) *Ibid.*, s. 373.

debenture-holder on behalf of himself and all the others) ;

- (1) If the principal money has become payable (see condition 10, p. 149).

Even if the money became due after the writ was issued (*Re Carshalton Park Estate, Ltd., Graham v. Carshalton Park Estate, Ltd.*, [1908] 2 Ch. 62).

- or (2) If the Company is wound up, even though the money is not expressly made payable in that event (*m*).

- or (3) If the security is in jeopardy, even if there has been no default in payment of interest, and no winding up.

e.g. if a judgment creditor has levied execution (*n*), or if a judgment remains unsatisfied (*o*), or if the company has closed down its business or even one of its chief branches (*p*), or if the company proposes to distribute its reserve fund among its members by way of dividend leaving the debentures insufficiently secured (*q*).

McMahon v. North Kent Iron Works, [1891] 2 Ch. 148

The works had been closed and the men discharged. The company was wholly insolvent; but no case had arisen under condition 10. A receiver was appointed.

Mere insufficiency of the security does not amount to jeopardy (*r*).

If there is no board of directors (*e.g.* if they are all "*alien enemies*"), or if disputes on the board have led to a

(*m*) And even if the winding up is for the purpose of reconstruction only. *Re Crompton & Co., Ltd., Player v. Crompton & Co., Ltd.*, [1914] 1 Ch. 954.

(*n*) *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574.

(*o*) *Re London Pressed Hinge Co., Ltd., Campbell v. London Pressed Hinge Co., Ltd.*, [1905] 1 Ch. 576.

(*p*) *Re Braunstein and Marjolaine, Ltd.*, (1914), 112 L. T. 25.

(*q*) *Tilt Cove Copper Co., Ltd.*, [1913] 2 Ch. 588.

(*r*) *Re New York Taxi-Cab Co., Ltd., Sequin v. New York Taxi-Cab Co., Ltd.*, [1913] 1 Ch. 1.

dereliction by the directors of their duties, a receiver and manager may be appointed (s).

The receiver, when appointed by the court, must give security for the safety of the assets in his hands. If the plaintiff debenture-holder wishes him to act at once (*i.e.* before he finds security), the plaintiff must undertake to be responsible until he gives security. The appointment of a receiver must be notified to the registrar (*t*). His remuneration can be fixed by the Court (*u*).

He must make the preferential payments (see pp. 299, 300) required to be made by s. 94 of the Companies Act. If he fails to do this, he may be liable in damages (*a*).

The court may supersede a receiver appointed by a debenture-holder, if the appointment was not for the benefit of all the debenture-holders (*Re Maskelyne British Typewriter, Ltd., Stuart v. Maskelyne British Typewriter, Ltd.,* [1898] 1 Ch. 133).

If the company is being wound up by the court, the court may appoint the Official Receiver to be receiver (*b*).

The court may also appoint a manager.

On the appointment of a receiver, the assets become specifically charged in favour of the debenture-holders, and the power of the company to deal with them in the ordinary course of business ceases, although it continues to exist as a company until it is wound up (*c*). If therefore it is necessary to carry on the business the court usually appoints the receiver to be receiver and manager.

A manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern; but this rule is not inflexible.

(s) *Trade Auxiliary Co. v. Vickers* (1873), L. R. 16 Eq. 303; *Stanfield v. Gibbon*, [1925] W. N. 11.

(t) Companies Act, s. 102. Penalty £5 per day.

(u) Companies Act, s. 371.

(a) *Woods v. Winkill*, [1913] 2 Ch. 303.

(b) Companies Act, s. 368.

(c) *Moss S.S. Co., Ltd. v. Whinney*, [1912] A. C. 254; *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160.

Re Victoria Steamboats, Ltd., Smith v. Wilkinson,
[1897] 1 Ch. 158

The company was formed to work passenger steamers on the Thames and also to carry on ferry work at Greenwich and Woolwich, under contracts with the Great Eastern Railway. The company was wound up and stopped the passenger service. The debenture-holders applied for a manager of the ferry business, on the ground that if the contracts were broken, there would be a heavy loss to the debenture-holders :—**Held**, the court has a discretion and will appoint a manager in this case, for though there is no immediate prospect of a sale, there will probably have to be a realisation some day.

If, however, there is no power to sell the business, a manager will not be appointed.

Marshall v. South Staffordshire Tramways Co.,
[1895] 2 Ch. 36

A tramway company (under the Tramways Act, 1870) mortgaged all its undertaking :—**Held**, generally the owner of an equitable charge has a right to a judicial sale. " But this does not extend to . . . an undertaking which has been acquired under statutory powers for public purposes, if those purposes will be defeated or . . . seriously affected by a judicial sale." As there is no power of sale, a manager cannot be appointed.

A manager is appointed for a limited period, usually three months. If he acts after the expiration of this period without a further order, his expenses may be disallowed (*d*).

The court may authorise the receiver to borrow money to be a first charge on the property of the company in priority to all the debentures, if it is required for the purpose of preserving the business.

Greenwood v. Algesiras (Gibraltar) Rail. Co., [1894]
2 Ch. 205

The court allowed the receiver to borrow £10,000 for the repair of landslips on a Spanish railway: for if they had not been repaired, the Government would have declared the railway forfeited for discontinuance of traffic.

(*d*) *Re Wood Green and Hornsey Steam Laundry, Trenchard v. Wood Green and Hornsey Steam Laundry*, [1918] 1 Ch. 423.

The claims of the persons who lend the money will then have priority over the claims of the debenture-holders (e), but will be postponed to the receiver's right of indemnity (f).

Leave to borrow money in this way will only be granted where there is clear evidence of advantage.

Securities and Properties Corporation, Ltd., v. Brighton Alhambra, Ltd. (1893) 62 L. J. Ch. 566

The receiver appointed by debenture-holders of a music hall had already borrowed £1,000, and had carried on the business for some time at a loss. He applied for leave to borrow another £1,000, in order to sell the business as a going concern :—Held, leave will not be granted, for this is a mere speculation.

If the receiver exceeds the amount authorised, his right of indemnity does not extend to the excess, even if he acted *bona fide*, unless it was reasonably necessary for him to borrow without applying to the court (*Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd., v. British Power Traction and Lighting Co., Ltd.*, [1906] 1 Ch. 497, (g)).

Remuneration

The Remuneration of a receiver may be fixed by the terms of the debenture or by the debenture-holders in accordance with its terms. But in any case, after a winding-up, the court can fix the remuneration.

(e) *Re Glasdir Copper Mines, Ltd., English Electro-Metallurgical Co., Ltd., v. Glasdir Copper Mines, Ltd.*, [1906] 1 Ch. 365.

(f) *Re Boynton (A.) Ltd., Hoffman v. Boynton (A.) Ltd.*, [1910] 1 Ch. 519. As to priorities where default is set off against indemnity, see *Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd., v. British Power Traction and Lighting Co., Ltd.*, [1910] 2 Ch. 470.

(g) And see *Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd., v. British Power Traction and Lighting Co., Ltd.*, (No. 2), [1907] 1 Ch. 528, as to what was authorised in that case.

This power of the court now extends to fixing the remuneration for any period before the making of the order or the application to the Court ^(h), and is exercisable notwithstanding that the receiver has died or ceased to act before the application.

Where he has received more than the rate fixed, he may be ordered to refund the excess.

^(h) Companies Act, s. 371, overruling *Re Greycaine, Ltd.*, [1946] Ch. 269.

CHAPTER XIII

UNDERWRITING

AN **underwriting agreement** is an "agreement whereby, previously to an offer of a company's shares to the public for subscription, some person undertakes, in consideration of a commission, to take the whole or a portion of such (if any) of the offered shares as may not be subscribed for by the public." (a).

Similar agreements may be made for underwriting debentures.

When a company offers a number of shares to the public, it is very often most important to secure that the whole issue shall be taken up. Even if the shares are almost certain to be taken, unforeseen events may happen, such as the outbreak of war or attacks against the company in the newspapers, which would endanger the success of the issue.

Consequently, a company is usually willing to pay a small commission on all the shares offered to the public to any one who will agree to take all the shares (if any) that the public do not take.

Brokerage is different. If the company agrees with A. that if he takes so many shares, the company will allow him a commission of £2 per cent., this may amount to issuing shares at a discount; but if A. is a broker, and employed as such by the company for **placing** shares, a proper commission or "brokerage" may be paid.

(a) Rawlins and Macnaghten, p. 220.

A person who “**places**” shares does not take them himself, but finds other persons who will take them.

A reasonable brokerage has always been allowed.

**Metropolitan Coal Consumers’ Association v.
Scrimgeour, [1895] 2 Q. B. 604**

A payment of two and a half per cent. to brokers was held to be valid.

Underwriting commission may only be paid under certain conditions. By section 53 of the Companies Act no company may apply any of its shares or capital either directly or indirectly, in the **payment of any commission, discount or allowance** to any person in consideration of his subscribing or agreeing to subscribe for or procure subscriptions for any shares unless—

- (1) the payment of the commission is authorised **in the articles**,
- (2) the^a commission does not exceed **10 per cent. of the price at which the shares are issued** or the amount or rate authorised by the articles (whichever is the less), and
- (3) the amount or rate agreed to be paid is **disclosed in the prospectus** or statement in lieu of prospectus, or (in case of a private company) in a special statement filed for the purpose (b).

Sometimes the underwriter enters into subsidiary contracts with other persons to relieve him of some or all of his liability for a commission. This is called “sub-underwriting.” The commission paid to sub-underwriters need not be disclosed in the prospectus (c).

(b) This section does not affect the power to pay brokerage, s. 53 (3).

(c) Sched. IV (11).

A sub-underwriter who gives an authority to apply for shares in his name cannot withdraw the authority (*d*).

The result of section 53 is that a company cannot apply its capital or shares in the payment of underwriting commission except in the manner mentioned in the Act.

This provision was sometimes used as an indirect way of issuing shares at a heavy discount: see *Keatinge v. Faringa Consolidated Mines, Ltd.* (1902) 18 T. L. R. 266; but by the Act of 1929 the rate of commission or discount was limited to 10 per cent.

Where shares have been issued at a premium, the share premium account may be applied in payment of commission on the issue of shares or debentures (*e*).

The Act does not prevent a company from giving, as the consideration for underwriting shares, an option to take further shares at par (*f*).

Hilder v. Dexter, [1902] A.C. 474

Shares were offered to fourteen persons on the terms that for each share taken up, the applicant should have an option of taking within a year one other share at par; and if he should take up this share within the year, then he should have a further option of taking up another share at par within the next year:—**Held**, this is valid. The company is not applying "any of its shares or capital," and is not paying "a commission, discount or allowance." The result is, in any case, that the company gets "par" for the shares.

These rules cannot be evaded by adding what is really an underwriting commission to the price paid by the company for property acquired by it (*g*).

(*d*) *Re Olympic Reinsurance Co.*, [1920] 2 Ch. 341.

(*e*) Companies Act, s. 56 (2).

(*f*) Taking a share at "par" means, giving £100 for a £100 share. To give less, is to take at a discount; to give more, is to take at a premium.

(*g*) Companies Act, s. 53 (2).

The contract usually takes the form of an underwriting agreement or an underwriting letter, which may be either—

- (1) An offer, which does not become binding until the company communicates its acceptance (*h*).

Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark, [1897] 1 Ch. 575

S., by letter, offered to subscribe or find subscribers for 10,000 shares, or so many as the company should agree to issue to him :—**Held**, this was merely an offer.

Or,

- (2) An acceptance of the terms offered by the company.

Re Hannan's Empress Gold Mining and Development Co., Carmichael's Case, [1896] 2 Ch. 643

C. signed a letter agreeing to take 1000 shares in consideration of a certain commission :—**Held**, this was a complete contract.

Form of Underwriting Agreement (*i*)

The agreement usually contains the following terms—

- (1) The underwriter agrees to underwrite a certain number of shares.
- (2) All the shares are to be offered to the public on the terms of a specified prospectus (*h*).
- (3) If the public do not take up all the shares, the underwriter is to take up the balance.
- (4) The underwriter authorises the company to allot him such balance of shares.
- (5) The company is to pay the underwriter a certain percentage of the nominal value of the shares underwritten.

(*h*) And see *Re Harvey's Oyster Co., Ormerod's Case*, [1894] 2 Ch. 474, where the agreement was to take shares "if and when called upon."

(*i*) See *Palmer's Precedents*, Part I. Chap. IV.

(*h*) If the terms of the prospectus are afterwards altered, the underwriting agreement may become void. *Warner International and Overseas Engineering Co., Ltd. v. Kilburn Brown & Co.*, (1914) 84 L. J. K. B. 365.

The amount of commission paid in respect of shares and debentures must be stated in every prospectus or statement in lieu of prospectus (1), and in the annual summary, and the rate of commission paid in respect of debentures must be entered in the register of mortgages kept by the registrar, and in every balance sheet of the company until the amount paid has been written off.

Importance of Sound Underwriting

The object of underwriting is to secure that the company will have sufficient working capital, and that persons who subscribe for shares may know that at least the amount underwritten will be forthcoming. The underwriting commission is paid to secure this object.

It is of the greatest importance to the company and the prospective shareholders that the persons or company who undertake the underwriting shall have sufficient financial resources to meet any obligation which may be thrown on them.

Unfortunately it has frequently happened in recent years that the underwriters have failed to provide the necessary capital when called upon, either because the underwriters are a company with insufficient capital or because the underwriting agreement releases the underwriters on the company allotting shares to sub-underwriters, some of whom may be insolvent.

It is one of the most important of the duties of the directors to satisfy themselves

- (1) that the underwriters have sufficient capital and assets to perform their obligation if called upon, and

(1) Companies Act, Scheds. IV and V.

- (2) that the underwriters are not released from their liability unless the sub-underwriters are solvent, or at least, unless the cheques paid in by the sub-underwriters are honoured, and the cash received by the company.

The directors should also remember that the protection hitherto usually provided by the articles can no longer be relied on (*m*).

(*m*) Companies Act, s. 203.

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CHAPTER XIV

DIRECTORS

SECTION 1

Position of Directors

A COMPANY registered after the Act of 1929 took effect must have at least two directors (*a*) ; but this does not apply to a private company, which however, must have at least one director and a secretary, and a sole director must not also be secretary (*b*). They need not necessarily be called " Directors." Thus there might be a " Council of Management " ; but the Act applies to any persons occupying the position of director, by whatever name called (*c*). A company usually appoints a certain number of directors to manage the business, to make contracts for the company, and to take care of the property of the company. Directors are sometimes said to be (1) **Trustees**, and sometimes (2) **Agents or managers**. Their exact position is hard to define.

(1) The directors are to some extent **trustees for the company**. Thus, the Limitation Act applies to their actions in the same way as to trustees (*cc*).

Re Lands Allotment Co., [1894] 1 Ch. 616

The company had no power to invest in shares of other companies. The directors invested £35,000 in shares of the Building Securities Co. in 1885. The company was wound

(*a*) Companies Act, s. 176.

(*b*) Companies Act, ss. 176, 177. The sole director may be a limited company (*Re Bulawayo Market and Offices Co., Ltd.*, [1907] 2 Ch. 458).

(*c*) *Ibid.*, s. 455

(*cc*) 2 and 3 Geo. 6, C.21. S.19.

up in 1893, *i.e.* more than six years later :—**Held**, the directors were protected under the Trustee Act, 1888, as there was no fraud (also they were not liable, as the shares were taken in payment of a debt).

Directors are trustees for the company of their power of approving transfers, issuing and allotting shares (*d*), and making calls.

Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56

For facts, see p. 107 above.

LINDLEY, M.R. : "The Court of Chancery has always exacted from directors the observance of good faith towards shareholders . . . and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits, and must account for them to the company."

Directors are trustees for the company and not for the individual shareholder.

Percival v. Wright, [1902] 2 Ch. 421

Directors bought shares from a shareholder while they were negotiating for the sale of the business of the company at a very high price, but did not tell him of this fact :—**Held**, the purchase of the shares was good.

And they are not trustees for third parties who have made contracts with the company (*e*).

Directors do not have to account so strictly as the trustees of, *e.g.*, a marriage settlement, and in many ways they differ from ordinary trustees.

(*d*) **Punt v. Symons & Co., Ltd.**, [1903] 2 Ch. 506, **Piercy v. Mills (S.) & Co.**, [1920] 1 Ch. 77 (where the directors issued shares to themselves for the purpose of getting the majority of the voting power).

(*e*) **Bath v. Standard Land Co., Ltd.**, [1911] 1 Ch. 618.

Smith v. Anderson (1880). 15 Ch. D. 247

JAMES, L.J.: "A trustee is a man who is the owner of property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee . . . The office of a director is that of a paid servant of the company. A director never enters into a contract for himself, but for his principal . . . he cannot sue on such contracts, nor be sued on them (unless he exceeds his authority)."

Directors are described as trustees, agents, or managing partners, not as exhausting their powers or responsibilities, but as indicating useful points of view,

"It does not matter much what you call them, so long as you understand what their true position is, which is that they are merely commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it"
(JESSEL, M.R., 10 Ch. D. 452).

(2) Directors are agents for the company. When they make contracts for the company, they are not liable themselves, unless they contract in their own names; then the other party can sue either the company or the directors, at his option.

Even if they make a contract which is *ultra vires*, and so cannot bind the company, the directors do not render themselves liable (except sometimes on an implied warranty of authority. See *Weeks v. Propert*, p. 141).

If the act done is not beyond the powers of the company, but only beyond the powers of the directors, then—

(1) If the contract is made with a member, it is voidable.

- (2) If made with an outsider who had no notice of the want of powers, it binds the company.

Such an act of directors may also be made valid by the acquiescence of every shareholder.

SECTION 2

Appointment of Directors

The first directors are usually named in the Articles.—This is not now a valid appointment unless each of the proposed directors has—

- (a) signed and delivered to the registrar a consent to act as director ; and

- (b) either—

- (i) signed the memorandum for his qualification shares ; or
- (ii) taken up and paid for them ; or
- (iii) signed a contract to take them from the company and pay for them ; or
- (iv) signed a declaration that a number of shares sufficient to qualify him are registered in his name (f).

If not named in the Articles, the first directors are appointed by the subscribers to the Memorandum. This must be done either—

- (1) by the **majority at a meeting** of subscribers (g),
- or
- (2) by a writing signed by **all** the subscribers.

If they do not meet, **all** the subscribers must sign the appointment, unless the Articles provide otherwise. See—

(f) Companies Act, s. 181. This does not apply to a private company, or a company which was a private company and was converted into a public company.

(g) *York Tramways Co. v. Willows* (1882), 8 Q. B. D. 685.

**Morley (John) Building Co. v. Barras, [1891]
2 Ch. 386.**

The company adopted Table A. (see p. 36, *ante*), which contains no provisions on this subject. A meeting of three of the seven subscribers appointed A., B., C., and D. as directors. Later, all seven subscribers signed a document appointing A., B., C., and E. as directors:—**Held**, the first appointment was bad, the second good (*h*).

The way in which subsequent appointments of directors are to be made is usually specified in the Articles, *e.g.*, by the company in general meeting, or by the continuing directors. If no provision is made, or if the directors fail to appoint anyone, the company in general meeting has power to appoint new directors (*i*).

Except in the case of a private company, two or more persons must not be appointed directors by a single resolution, unless a resolution that this shall be done has been agreed to by the meeting without any adverse vote. A resolution which infringes this provision is void (*k*).

The power of the company in general meeting to appoint directors is not taken away by the usual provisions in the articles enabling the directors to fill vacancies or appoint additional directors (*l*).

Power may be given to an outsider to appoint directors: *British Murac Syndicate, Ltd. v. Alpertown Rubber Co., Ltd.*, [1915] 2 Ch. 186.

Where the Articles give power to a director to assign his office to another, the assignment is not effective unless approved by a special resolution (*m*).

(*h*) And see *Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472.

(*i*) *Barron v. Potter*, [1914] 1 Ch. 895.

(*k*) Companies Act, s. 183 (1).

(*l*) *Worcester Corsetry, Ltd. v. Witting*, [1936] Ch. 640.

(*m*) Companies Act, s. 204.

A company must keep a register of its directors containing their names and any former names, their addresses, their nationality, their business occupations (if any), particulars of any other directorships held by them (with certain exceptions), and in certain cases the dates of their births and must send copies of the register to the registrar, and must also notify to the registrar any change among its directors (n).

A Company must also keep a *register of director's shareholdings*, showing the number, description and amount of shares and debentures of the company or its subsidiaries which are held by or in trust for each director, or of which he has any right to become the holder.

Where any such shares or debentures are to be so held, the register shall show the date of and price or other consideration for the transaction (o).

SECTION 3

Quorum

A **quorum** is the number of directors who must be present at any meeting.

The **minimum number** is the number of directors who must be holding office at any time.

If a **minimum number** of directors is fixed by the Articles, and the number falls below the minimum, the remaining directors cannot act. But the Articles may authorise the directors to act in spite of a vacancy.

Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim, [1901] 1 Ch. 115

By the Articles the affairs of the company were to be conducted by a council of not less than three. Article 42 allowed the Council to act in spite of a vacancy. The numbers of the council were reduced to two. The remaining two gave certain securities:—**Held**, these securities would have been void, but were saved by Article 42.

(n) Companies Act, s. 200.

(o) Companies Act, s. 195.

The **quorum** of directors is usually fixed by the Articles. A quorum may be defined as "The number of directors **qualified to act** who must be present at a meeting to enable them to act as a board."

Re Greymouth Point Elizabeth Rail and Coal Co., Ltd., Yuill v. Greymouth Point Elizabeth Rail and Coal Co., Ltd., [1904] 1 Ch. 32

The Articles provided that a director must not vote on a matter in which he was interested, and two directors were to be a quorum. There were only three directors: two of these lent £2,000 to the company, and the board (*viz.*, the three directors) agreed to give them debentures to secure it. Thus, though three directors were present, two were disqualified from voting:—**Held**, the agreement was void (*p*).

If no quorum is fixed by the Articles, the number of directors who usually act will be sufficient; but in any case, notice of the meeting must be given to **all** the directors (*q*).

SECTION 4

Qualification

There need not be any qualification for directors, but the Articles usually provide that no person shall act as director unless he holds a certain number of shares or stock.

If any qualification is fixed, then—

- (1) It must be **disclosed in the prospectus** (*r*);
- (2) Each director **must take his qualification shares within two months** of his appointment, otherwise he vacates office, and renders himself liable to a fine of £5 for every day that he acts as director (*s*).

(*p*) See also *North Eastern Insurance Co.*, [1919] 1 Ch. 198.

(*q*) *Re Tavistock Ironworks Co.*, *Lyster's Case* (1867), L. R. 4 Eq. 233.

(*r*) Companies Act, Sched. IV, (2).

(*s*) *Ibid.*, s. 182.

- (3) The company cannot commence business until every director has taken up his qualification shares and paid on them, if payable in cash, the same proportion as the public have to pay on application and allotment (z).

The Articles frequently provide that the qualification of a director shall be the holding of a certain number of shares "in his own right." It would perhaps be better to provide that he must hold them "beneficially," for the former words are satisfied if the director holds the shares as "trustee for others" (a) unless it appears on the register that he is merely a trustee.

Boschoek Proprietary Co., Ltd. v. Fuke, [1906] 1 Ch. 148

A director was entered on the register as the holder of shares as liquidator of another company :—Held, he was not qualified.

The director must hold the shares in such a way that the company may safely deal with him as owner of the shares.

Sutton v. English and Colonial Produce Co., [1902] 2 Ch. 502

The qualification of a director was the holding of 100 shares "in his own right." S., a director, held 1,000 shares. S. became bankrupt; his trustee in bankruptcy gave notice to the company that he claimed the shares, but did not wish to be registered for a few days. The board of directors excluded S. as being disqualified :—Held, S. was disqualified.

(t) *Ibid.*, s. 109.

(a) *Cooper v. Griffin*, [1892] 1 Q. B. 740; *Pulbrook v. Richmond Consolidated Mining Co.*, (1878), 9 Ch. D. 610; *Howard v. Sadler*, [1893] 1 Q. B. 1. In such a case the dividends on the shares belong to the beneficiaries, but the remuneration of the director or trustee belongs to him (*Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65).

Shares which are held by a director jointly with any other person may be a sufficient qualification (b).

If a director takes his qualification shares as a present from the promoters, this is a breach of trust, and he must account to the company for the amount.

Re Canadian Oil Works Corporation, Hay's Case (1875), 10 Ch. App. 593

The directors agreed with Hay, that if he would become a director they would give him forty £25 shares as his qualification. The promoters then paid Hay £1,000. Hay then applied to the company for the shares, and paid £1,000 for them :—**Held**, Hay holds the £1,000 as trustee for the company.

If a director holds his qualification shares as a nominee or trustee for a promoter, he is liable to the company for damages, which will usually be the nominal value of the shares (c).

Share warrants to bearer cannot be treated as qualification shares (d).

Disqualification

A director becomes disqualified if he loses his qualification, or if he does any act which, by the Articles, amounts to a disqualification (see Art. 88 of Table A (p. 382)), e.g. to hold a paid office under the company such as a paid trustee of a debenture deed (*Astley v. New Tivoli, Ltd.*, [1899] 1 Ch. 151). A director who becomes bankrupt cannot act as a director without leave of the Court (e).

Where "Absenting himself" is a disqualification, this refers only to voluntary absence.

Re London and Northern Bank, Mack's Claim, [1900] W. N. 114

A director who lived in Belfast was seriously ill and unable to travel, and failed to attend several meetings :—**Held**, he did not vacate his office.

(b) *Grundy v. Briggs*, [1910] 1 Ch. 444.

(c) *Re London and South Western Canal, Ltd.*, [1911] 1 Ch. 346.

(d) Companies Act, 182 (2).

(e) Companies Act, s. 187.

When the disqualification consists in "making a secret profit," the disqualification does not prevent re-election after the transaction is complete.

Re Bodega Co., Ltd., [1904] 1 Ch. 276

W., one of the directors, made a secret profit in 1900. He was re-elected in 1901. In 1902 the secret profit was discovered:—**Held**, the disqualification ceased as soon as it became complete in 1900, and the re-election in 1901 made him a director again.

Where a person has been convicted of an offence in connection with the promotion, formation or management of a company or has been guilty of fraudulent trading or of any fraud in relation to the company, the court may make an order that such person shall not without leave of the court be a director or be concerned in the management of a company for any period up to five years (f).

A disqualified director ceases to be a director, and therefore cannot act. If he does act, the company may restrain him from doing so by injunction, but cannot sue him for damages.

An individual shareholder cannot take any proceedings against him for acting; for an individual shareholder cannot, as a rule, sue to redress a wrong done to the company. This is known as:—

The rule in Foss v. Harbottle (g).

Burland v. Earle, [1902] A. C. 83

Directors instead of paying profits to shareholders, invested them:—**Held**, to redress a wrong done to the company the action should be brought by the company itself, except where the persons against whom relief is sought hold the majority of the shares and will not allow the company to bring an action; and even then,

(f) Companies Act, s. 188.

(g) (1843), 2 Hare, 461.

only in case of dealings which the company in general meeting could not ratify, as in the case of a fraud on the minority or *ultra vires* acts (*h*).

Sect. 180 of the Act provides that the acts of a director or manager shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification, and the Articles generally contain a similar clause. See Art. 105 of Table A, *post*, p. 385.

This applies both to dealings with outsiders and to dealings with the members of the company.

British Asbestos Co., Ltd., v. Boyd, [1903] 2 Ch. 439

B., R., and M. were directors. Two formed a quorum. The Articles contained a clause similar to Article 105 of Table A (*post*, p. 385), and it was a disqualification to hold any office of profit in the company. M. resigned. B. became secretary for two months, and was therefore disqualified. During that time B. and R. appointed D. as director. The appointment of D. was disputed:—**Held**, D.'s appointment was valid. The Article, together with sect. 67 of the Companies Act, 1862 (now section 180), covers cases where the facts causing disqualification were known at the time, but the knowledge was not present to the minds of the directors. Also, this clause applies to a question of internal management, such as the appointment of a director.

But this section and article will not cover a case where, owing to fraud and forged minutes of a non-existent meeting, there never was any appointment at all.

Morris v. Kanssen, [1946] A. C. 459

Kanssen and Cromie were the two first directors of the company and held all the shares.

Cromie alleged that at a board meeting, Strelitz was appointed a director. This meeting never took place, and the minute recording it was fabricated.

(*h*) See the rule explained in *McDougall v. Gardiner* (1875), 1 Ch. D. 13. As to the use of the company's name see *Normandy v. Ind, Coope, Ltd.*, [1908] 1 Ch. 84; and *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co.*, [1909] 1 Ch. 267 (where the solicitor was held personally liable to pay the costs); and *Baillie v. Oriental Telephone and Electric Co., Ltd.*, [1915] 1 Ch. 503 (where a special resolution had been obtained by a trick).

At another meeting Cromie and Strelitz, without Kanssen's knowledge, purported to appoint Morris a director and allotted shares, some to Morris and some to Strelitz who transferred them to Morris:—Held, this was not a case of a defect in the appointment of directors, which was afterwards discovered; but there never was any appointment of Strelitz or Morris, and sect. 143, [now 180] did not apply, and neither Strelitz nor Morris were directors and there had been no allotment of shares to Morris.

A director who acts while not qualified incurs a penalty (*i*); but the court may grant relief from this liability (*k*). A disqualified director is not entitled to the remuneration provided by the articles for a director; but he may sue the company for the value of his services (*l*).

Removal

A director who is unsatisfactory may be removed by the company. Before 1948, the power of removal was governed entirely by the Articles (*m*). But now, a company may, notwithstanding anything in the Articles, or any agreement, remove a director by ordinary resolution (*n*).

This does not apply to a director of a private company who held office for life on the 18th July, 1945 (*o*).

“Special Notice” (see p. 224, *post*) must be given of any resolution to remove a director or to appoint someone in his stead. The company on receiving notice of such a resolution must send a copy of it to the director in question and he is entitled to be heard at the meeting. He may make written representations and may request that these be notified to the members and

(*i*) Companies Act, s. 182 (5). *Re Gilt Edge Safety Glass* [1940] Ch. 495.

(*k*) S. 448. *Re Barry and Staines Linoleum, Ltd.*, [1934] Ch. 227.

(*l*) *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K. B. 403.

(*n*) Companies Act, s. 184, re-enacting s. 29 of 1947.

(*o*) *Browne v. La Trinidad* (1887), 37 Ch. D. 1.

the company must, in the notice of the meeting, where possible, state the fact of this representation to the members and send a copy of it to every member to whom notice of the meeting is sent.

Where a director is so removed, the appointment of another person in his place may be made without notice.

A director so removed may be entitled to compensation or damages if the Articles, or his agreement, so provide (*n*).

Resignation.—A director can resign his office in the manner provided by the Articles. If the Articles contain no provision, he can resign on reasonable notice, and his resignation need not be accepted by the company.

A director who has resigned by a proper notice cannot withdraw his resignation (*o*).

Where the Articles provide that a director may resign in writing, a verbal resignation accepted by the company in general meeting is effective and cannot be withdrawn (*p*).

SECTION 5

Retirement

The Articles usually provide that a proportion of the directors shall retire by rotation year by year.

Where the articles provide that the number nearest but not exceeding, one-third, shall retire, and the number of directors is reduced to two, neither need retire (*q*).

If the articles require the meeting to stand adjourned until the same day in the next week if the place of a retiring director is not filled up, this does not prevent

(*n*) Companies Act, s. 184 (6).

(*o*) *Glossop v. Glossop*, [1927] 2 Ch. 370.

(*p*) *Latchford Premier Cinema, Ltd. v. Ennion*, [1931] 2 Ch. 409.

(*q*) *Re Moseley & Sons, Ltd.*, [1939] Ch. 719.

the meeting being adjourned to some other date (r). A director whose place is not filled up, continues in office until he retires by rotation, even if at the meeting the retiring directors are not re-elected (s).

A director must now retire after he has attained the age of 70, and a person cannot be appointed director who has reached that age; but this does not apply where the appointment is made or approved in general meeting after "special notice" has been given, and may be qualified by provisions in the Articles (a).

SECTION 6

Remuneration of Directors

The remuneration of the directors (if any) must be stated in the prospectus (b) and disclosed in the balance sheets (c).

Directors are not entitled to any remuneration apart from express agreement.

The Articles usually provide for their remuneration; if so, it cannot be changed or increased without a special resolution (d).

Directors cannot get their travelling and other expenses in addition to their remuneration, unless this is expressly provided for (e).

(r) *Spencer v. Kennedy*, [1926] Ch. 125

(s) *Holt v. Catterall*, (1931), 47 T. L. R. 332. *Grundt v. Great Boulder Proprietary Gold Mines, Ltd.*, [1948] Ch. 145; [1948] 1 All. E. R. 21 disapproving *Butcheller (Robert) & Sons, Ltd. v. Butcheller* [1945] Ch. 169.

(a) Companies Act, s. 185.

(b) Companies Act, Sched. IV (2).

(c) Companies Act, s. 196.

(d) *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148; *Kerr v. Marine Products, Ltd.* (1928), 44 T. L. R. 292.

(e) *Young v. Naval, Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K. B. 687.

The remuneration of directors must not be paid free of income tax ; but, subject to certain existing contracts, any provision in the Articles or Contract for payment of remuneration free of tax, shall have effect as if it provided for payment, as a gross sum, subject to tax, of the net sum for which it provides (*f*).

If the Articles provide for remuneration, it becomes a debt due from the company to the directors, and may be sued for, and may be paid out of capital if there are no profits.

Re Lundy Granite Co., Ltd., Lewis's Case (1872),
26 L. T. 673.

The remuneration was to become one-tenth of the profits, but not less than £100 a year. There were no profits for for several years;—**Held**, the directors were entitled to £100 a year.

When a company is making no profits, the directors frequently agree to waive their remuneration, but they are not bound to do so.

There is sufficient consideration to support such an agreement, if the several directors mutually agree to waive their claims (*g*).

If the remuneration is to be “ at the rate of £—— a year,” a director who acts for part of a year is entitled to a proportionate share of remuneration.

If the remuneration is to be “ a yearly sum of £——,” or even “ £—— per annum,” it has been held that a director will not get anything in any year unless he acts for the whole year.

Inman v. Ackroyd and Best, Ltd., [1901] 1 K. B. 613

The remuneration was to be “ the sum of £125 per annum per director.” I. served for one year and seven months:—**Held**, if it had been “ at the rate of ” £125 per annum, I. would be entitled to be paid for one year and seven months.

(*f*) Companies Act, s. 189.

(*g*) *West Yorkshire Darracq Agency, Ltd. v. Coleridge*, [1911] 2 K. B. 326.

But in this case he is only entitled to be paid £125 for the one complete year.

This decision has, however, been doubted. The remuneration in such a case appears to be apportionable under the Apportionment Act (*h*).

If a director is a trustee of his qualification shares, he may retain his remuneration for himself (*i*).

Compensation cannot now be paid to directors for loss of office or as consideration for or in connection with retirement unless the amount to be paid is disclosed to the shareholders and approved by the company, and any provision in the articles is void which authorises payment to a director of such compensation without particulars of the proposed payment being disclosed to the members and the proposal being approved by the company (*k*).

The provisions of the Act for particulars of payments to directors being sent with any offer made to the general body of shareholders (see p. 342, *post*), extend to an offer by or on behalf of another company with a view to the company becoming its subsidiary or a subsidiary of its holding company or by or on behalf of an individual with a view to his obtaining control of not less than a third of the voting power (*l*).

In any accounts laid before the company in general meeting or in a statement annexed thereto, there must now be shown.

- (i) the aggregate amount of the directors' " emoluments," paid in respect of their services as directors of the company or of its subsidiary or otherwise in connection

(*h*) *Moriarty v. Regent's Garage Co.*, [1921] 1 K. B. 423; *Diamond v. English Sewing Cotton Co.*, [1922] W. N. 237.

(*i*) *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65.

(*k*) Companies Act, ss. 191, 192. *Kaye v. Croydon Tramways*, [1898] 1 Ch. 358.

(*l*) Companies Act, s. 193.

with the management of the affairs of the company or any subsidiary thereof ;

- (ii) the aggregate amount of directors' or past directors' pensions and,
- (iii) the aggregate amount of any compensation to directors or past directors in respect of loss of office.

" Emoluments " include fees and percentages and sums paid by way of expenses allowance (*m*).

SECTION 7

Powers of Directors

The powers of the directors are generally described in the Articles and there is usually a clause giving them powers of management and all the powers of the company which are not otherwise dealt with. See Art. 80 of Table A (p. 379).

This general clause is not to be construed "*ejusdem generis*," but is valid and effectual.

Re Pyle Works (No. 2), [1891] 1 Ch. 173

Two directors of the P. Company gave a guarantee to a railway company, by reason of which the railway company agreed to carry goods on credit for the P. Company. The board of the P. Company therefore agreed that it should indemnify the two directors by a charge on its uncalled capital. The Articles only gave directors power to secure money when borrowed. The Memorandum gave the company power to issue securities generally. The Articles contained a clause similar to clause 80 of Table A :—**Held**, the directors have power to give this charge.

The directors are the only persons who can deal with the matters thus assigned to them, and their decision cannot be overruled even by a general meeting of the company (*n*),

(*m*) Companies Act, s. 196.

(*n*) *Automatic Self-Cleaning Filter Syndicate Co., Ltd. v. Cunningham*, [1906] 2 Ch. 34 ; *Salmon v. Quin and Axtens, Ltd.*, [1909] 1 Ch. 311 ; *Scott v. Scott*, [1943] 1 All E. R. 582.

unless the Articles are altered by a special resolution, or unless the directors are acting in their own interests against the interests of the company (o). They should, however, communicate their policy to the shareholders, and are bound to do so, if their policy is attacked by any of the shareholders (p).

The shareholders may enlarge the powers of the directors, and so enable them to do anything that the company could do ; or, if the directors do some act beyond their powers, the shareholders may ratify their act, if it is within the powers of the company.

A director cannot make a contract with the company ; otherwise there would be a conflict between his own private interest and his duty to the company.

Any such contract will be held to be void, without any inquiry as to its fairness.

Parker v. McKenna (1874), 10 Ch. App. 96

S. agreed to take 9,000 shares on certain terms by which he was to pay £30 premium down, and the rest by instalments. The directors took over part of his bargain and released him from some of its terms:—Held, this was a contract in which it was important for the directors to watch the interests of the company. Therefore the contract with them was void, and they must refund the profit made on the shares (q).

The same rule applies to a contract by the company with another company in which a director of the first company holds shares. *Transvaal Lands Co. v. New Belgium Transvaal Land and Development Co.*, [1914] 2 Ch. 488.

There are two exceptions to this rule—

- (1) A director may agree to take shares of the company.

(o) *Marshall's Valve Gear Co. v. Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267.

(p) *Peel v. London and North-Western Rail. Co.*, [1907] 1 Ch. 5.

(q) See also *Victors, Ltd. v. Lingard*, [1927] 1 Ch. 323.

- (2) The Articles may modify the rule and allow a director to make contracts with the company, or to be interested in contracts so made. In such a case he must disclose his interest at the first meeting of the directors at which the contract is taken into consideration or at the next meeting after he first became interested.

A director may give a general notice that he is interested in any contract with a particular company or firm, but such notice must be given at a meeting of directors or he must take care to see that it is sent to the next meeting of directors after it is given. (r). The Articles usually provide that he shall not vote.

This does not necessarily prevent him from voting on the same question at a meeting of shareholders (s).

The directors must act at a meeting (called a "**board meeting**") unless the Articles give them power to act otherwise. The meeting must be duly summoned; that is, due notice of the meeting must be given to every director. The meeting may be held anywhere, *e.g.* in a passage (t).

The decisions of the directors take the form of **resolutions**, *e.g.* "Resolved that shares Nos. — to — be allotted to —," etc.

Minutes of the meetings are kept and signed by the chairman, but an unrecorded resolution may be proved *aliunde* (u).

Directors may not delegate their powers unless the Articles expressly give them power to do so.

(r) Companies, Act, s. 199.

(s) *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, but see *Cook v. Deeks*, [1916] 1 A. C. 554.

(t) *Smith v. Paranga Mines*, [1906] 2 Ch. 193.

(u) *Knight's Case* (1867), 2 Ch. App. 321; *Fireproof Doors, Ltd.*, [1916] 2 Ch. 142.

Re Liverpool Household Stores (1890), 59 L. J. Ch. 616

Directors, under powers expressly given by the Articles delegated all their powers to a committee of three. This was recognised as valid.

The powers of directors cease on the commencement of a winding-up (*v*).

SECTION 8

Loans to Directors

Loans to a director of a company or its holding company are prohibited ; but this does not apply to

- (1) private companies ;
- (2) loans made by a subsidiary to its holding company ;
- (3) subject to disclosure and approval by the company in general meeting, loans to enable a director to meet expenditure to enable him to perform his duties to the company ;
- (4) loans made in the ordinary course of business by a company whose ordinary business includes lending money (*w*).

In addition to this, particulars of loans made to any officer of the company must be shown in the accounts laid before the company in general meeting (*a*).

SECTION 9

Duties and Liabilities of Directors

There are numerous provisions of the Companies Act which it is the duty of directors to carry out and they may be liable to penalties if they fail to perform them.

(*v*) Companies Act, ss.285 (2), and 296 (2).

(*w*) Companies Act, s. 190.

(*a*) Companies Act, s. 197.

Among these duties they must

- (1) See that proper accounts are kept and balance sheets and profit and loss accounts are prepared and laid before the company with the directors' report as to the state of the company's affairs. The report must deal with any change during the financial year in the nature of the company's business or in the company's subsidiaries (*b*).
- (2) Keep a register of members (*c*).
- (3) Make an annual list and summary and sign the copy of the annual return provided to the Registrar and the certificate as to any balance sheet included in the annual return (*d*).
- (4) Send to the registrar notice of conversion of shares into stock or of consolidation or division of shares (*e*).
- (5) Call an annual general meeting every year within the proper time (*f*).
- (6) Send in a proper report before the statutory meeting (*g*).
- (7) Send to the registrar copies of special and extraordinary resolutions (*h*).
- (8) Keep a register of directors and secretary and notify changes in the board (*i*).
- (9) Take care not to allot shares until minimum subscription subscribed, etc. (*j*).
- (10) Send in a proper return of allotments (*k*).
- (11) State in every balance sheet the amount paid by

(*b*) Companies Act, ss. 147, 157.

(*c*) *Ibid.*, ss. 110, 440.

(*d*) *Ibid.*, s. 124, 125, 127

(*e*) *Ibid.*, s. 62.

(*f*) *Ibid.*, s. 131.

(*g*) *Ibid.*, ss. 130, 225.

(*h*) *Ibid.*, s. 143.

(*i*) *Ibid.*, s. 200.

(*j*) *Ibid.*, ss. 47, 48.

(*k*) *Ibid.*, s. 52.

(*l*) *Ibid.*, Eighth Schedule, Part I (3).

way of underwriting commission until written off (*l*).

(12) Have certificates ready for delivery (*m*).

(13) Keep registers of mortgages and charges and allow inspection (*n*).

(14) **On winding up.**—Submit a statement of affairs (*o*).

Directors are not personally liable in contracts which they make for the company ; but they may be liable—

(1) in case of *ultra vires* transactions, on an implied warranty of authority (see p. 141) ;

(2) to persons who subscribe for shares, in case of untrue statements in the prospectus (*p*) ; or

(3) to the company, where they have acted in a manner which is *ultra vires*.

It is not necessary to prove fraud, where directors have applied capital in payment of objects *ultra vires*, e.g. in the payment of dividends out of capital (*Masonic Co. v. Sharpe*, [1892] 1 Ch. 154, at p. 165).

(4) to the company in case of negligence.

Negligence means failure to use the care of an ordinary person in his own affairs (*q*).

Re City Equitable Fire Insurance Co., [1925] Ch. 407

The directors left the whole control of the dealings with the uninvested funds of the company in the hands of Bevan, who was the managing director and the senior partner in the firm who acted as brokers of the company. Very large sums were left in the hands of the brokers and were lost to the company. The directors acted honestly and had entire confidence in Bevan, who was at the time a financier of high reputation :—**Held**, the directors who passed the annual balance sheets were guilty of negligence in not

(*m*) *Ibid.*, s. 80.

(*n*) *Ibid.*, ss. 87, 95, 96, 104, 105 (*o*) *Ibid.*, s. 235.

(*p*) Companies Act, s. 43.

(*q*) *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787, at p. 804 ; *Brazilian Rubber Plantations*, [1911] Ch. 425, at p. 436.

ascertaining how the funds of the company appearing in the balance sheets were invested; but held also that the directors were excused from liability by an article which provided that they should only be responsible for "wilful default" (r).

A clause in the Articles protecting directors from liability in case of negligence is not now valid (s).

If directors act within their powers in the bona fide exercise of their discretion, they are not liable for mere errors of judgment, and the burden of proof lies on those who seek to charge them with bad faith.

Re New Mashonaland Exploration Co., [1892]
3 Ch. 775

The directors agreed to lend £1,250 to G., on his giving security. Cheques were paid to G. at once, but he never gave security:—Held, this is a doubtful case, but the burden of proof lies on the plaintiffs to prove fraud, and they have not done so. The directors are not liable, as they have exercised their judgment and are not liable for mere errors of judgment.

A director is not liable if he can show that he acted without knowledge of the facts which made his act illegal, provided he was not guilty of negligence (t). And in any case, if he has acted honestly and reasonably and ought fairly to be excused, having regard to all the circumstances of the case, the court can relieve him from liability (a), even if his acts have been ultra vires (b).

A director who habitually abstains from board meetings may become liable for the acts of his co-directors. But he is not bound to attend all board meetings.

(r) See also *Re City of London Insurance Co., Ltd.* (1925), 41 T. L. R. 521.

(s) Companies Act, s. 205.

(t) *Dovey v. Cory*, [1901] A. C. 477.

(a) Companies Act, s. 448.

(b) *Re Clavidge's Patent Asphalt Co., Ltd.*, [1921] 1 Ch. 543.

Re Denham & Co. (1883), 25 Ch. D. 752

All the powers of management were vested in D. C., one of the directors, did not attend the board meetings as a rule. Dividends were paid for four years out of capital. C. himself on one occasion moved a resolution for a dividend at fifteen per cent., but he had no reason to suspect any misconduct :—**Held**, C. was not liable.

A director who signs cheques makes himself liable if the cheque ought not to have been paid, unless he takes reasonable care to satisfy himself of the purpose for which and the authority under which the cheques have been signed (c).

One method by which a director may be made liable is by a " misfeasance " summons.

This is an application to the court by summons in the winding up, made by the liquidator or any creditor or contributory under sect. 333 of the Companies Act (d).

On the death of a director, his personal representatives could not, before 1934, be sued, except so far as he had retained property himself and his estate had benefited (e); and his estate could not be made liable under sect. 333 (f). But by the Law Reform (Miscellaneous Provisions) Act, 1934, the right of action survives under certain conditions (see p. 50, *ante*).

If one of several directors has been made to pay for misfeasance, he is entitled to contribution from the others.

Ashurst v. Mason (1875), L. R. 20 Eq. 225

B., a director, held 250 shares with nothing paid. He resigned. His shares were, by a resolution of the directors,

(c) *Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 381, at p. 404.

(d) A summons for directions must now be taken out as in an action, and the summons is usually heard with witnesses. [1921] W. N. 356; [1922] W. N. 294.

(e) *Peek v. Gurney* (1873), L. R. 6 H. L. 377, at pp. 392-393.

(f) *Re British Guardian Life Assurance Co. (1880)*, 14 Ch. D. 335.

transferred to A., one of the directors, in trust for the company. This, of course, was illegal. The company was wound up, and A. had to pay in full:—**Held**, all the directors are liable to contribute their shares of this loss (*g*).

The same rule applies to his liability under s. 43 of the Companies Act for misrepresentations in a prospectus, and even though some of the directors are dead (*h*).

Directors may also incur criminal liability if they issue a prospectus which includes any untrue statement (*i*).

As to what is an untrue statement, see p. 49, *ante*.

Board of Trade Inspection

If shareholders holding at least one-tenth of the issued shares of a company, or 200 shareholders whatever their shareholding, think the conduct of the directors requires investigation, they may apply to the Board of Trade to appoint inspectors to investigate the affairs of the company (*k*). This power must be exercised if the company by special resolution, or the court by order declares that the company's affairs ought to be investigated by an inspector (*l*).

The Board of Trade may itself now appoint inspectors without any such application if it appears that fraud is being committed or that the members have not been

(*g*) This case was followed and explained in *Jackson v. Dickinson*, [1903] 1 Ch. 947. And see now Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, ch. 30), s. 6.

(*h*) *Shepherd v. Bray*, [1906] 2 Ch. 235; but see S. C., C. A., [1907] 2 Ch. 571.

(*i*) Companies Act, s. 44

(*k*) Companies Act, s. 164.

(*l*) *Ibid.*, s. 165.

given all the information which they might reasonably expect (*l*).

The Board may now also appoint inspectors, if they think there is reason to do so, to investigate and report on the membership of the company, to find out who are financially interested in the success of the company or able to control it, and for this purpose they may require the persons interested to give them information and impose restrictions on the shares if they are not satisfied (*m*).

(*m*) Companies Act, ss. 172, 173, 174

CHAPTER XV

THE SECRETARY

It is the duty of the secretary to make himself acquainted with the provisions of the Companies Act and to see that the directors comply with its requirements (see pp. 211, 212, *ante*). The secretary is usually appointed by the directors at a board meeting, and his powers and duties and salary are generally fixed by a written agreement. If not, they are determined by the terms of the resolution appointing him and the Articles.

Every company must now have at least one director as well as a secretary (*a*).

A company must now include in the register of directors, the name and address, and any former name, of the secretary, or if the secretary is a corporation, its corporate name and registered or principal office (*b*).

The secretary can act as agent for the company to do such things as are delegated to him, or are usually performed by the secretary. He is not usually empowered to make contracts, and any representations made by him to induce persons to enter into contracts are not as a rule binding on the company (*c*). He cannot without the authority of a resolution of the directors call a meeting of the company (*d*), or alter the register of members (*e*).

(*a*) Companies Act, ss. 177 to 179.

(*b*) *Ibid.*, s. 200.

(*c*) *Barnett v. South London Tramways Co.* (1887), 18 Q. B. D. 815.

(*d*) *Re State of Wyoming Syndicate*, [1901] 2 Ch. 431.

(*e*) *Chida Mines v. Anderson* (1905), 22 T. L. R. 27.

The secretary is acting within the ordinary scope of his duties when he certificates a transfer, and if he does so fraudulently, he may now expose the company to liability (see p. 99, *ante*), or if he acts fraudulently in the course of his other duties (*f*).

A director who advanced money to the company at the request of the secretary without the authority of the board of directors, could not enforce the loan against the company (*g*).

A secretary is an "officer" of the company (*h*), and as such may incur heavy penalties if he destroys or falsifies books or papers or makes false or fraudulent entries (*k*).

(*f*) *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716.

(*g*) *Re Cleadon Trust, Ltd.*, [1939] Ch. 286; [1938] 4 All E. R. 518.

(*h*) Companies Act s. 455.

(*k*) *Ibid.*, s. 329.

CHAPTER XVI

MEETINGS AND RESOLUTIONS

SECTION 1

Meetings

USUALLY two persons at least are necessary to constitute a meeting.

But where all the shares of a particular class are held by one person, such person alone may do what a meeting of shareholders of that class could do under the articles (*a*), and, where the court or the Board of Trade convene a meeting, they may direct that one member present in person shall be deemed to constitute a meeting (*b*).

Meetings of shareholders are of three kinds :

(1) **Statutory meeting.**—A company must hold a general meeting within not less than one month and not more than three months from the date at which it is entitled to commence business (*c*). This meeting is called the **statutory meeting**. A report must be sent to all the shareholders fourteen days before this meeting (*d*), stating :

(a) the number of shares allotted, how much has been paid up and the consideration for allotment ;

(b) the cash received by the company for these shares ;

(c) an abstract of the receipts and payments of the company, and an estimate of the preliminary expenses ;

(a) *East v. Bennett Bros., Ltd.*, [1911] 1 Ch. 163.

(b) Companies Act, s. 135. (c) Companies Act, s. 130.

(d) *Ibid.*, s. 130 (2).

(d) names, etc., of directors, auditors, manager and secretary;

(e) if any contract is to be submitted to the meeting for modification, then particulars of the contract and the proposed modifications.

A list of members must be produced at the meeting.

This ensures that, within a short time from the commencement of a company, all the shareholders shall have a chance of ascertaining the exact position of the company. A private company need not hold a statutory meeting (c).

The company cannot before the statutory meeting alter the terms of any contract referred to in the prospectus except subject to the approval of the statutory meeting (f).

The notice convening the statutory meeting should state that it is intended to be the statutory meeting (g).

(2) **Ordinary meeting.**—The Articles generally provide that there shall be an **annual general meeting**, to be held on a certain date. This is an ordinary meeting.

Every company must in each year, hold a general meeting as its “annual general meeting” in addition to any other meetings in that year, and must specify the meeting as such in the notices calling it; and not more than fifteen months may elapse between the date of one annual general meeting of the company and that of the next:

But if a company holds its first annual general meeting within eighteen months after its incorporation, it need not hold it in the year of its incorporation or in the following year (h).

(c) Companies Act, s. 130 (10).

(f) Companies Act, s. 42.

(g) *Gardner v. Iredale*, [1912] 1 Ch. 700.

(h) Companies Act, s. 131 (1).

If the company does not call an annual general meeting as above provided, the Board of Trade may convene a meeting (*i*).

(3) **Extraordinary Meeting.**—If there is some business which must or ought to be transacted before the next ordinary meeting, the directors may call an extraordinary meeting.

The holders of not less than one-tenth of the paid-up capital of the company carrying a right of voting may at any time compel the directors to call an extraordinary meeting (*k*).

The Articles may extend this power (*e.g.* by allowing the holders of one-twentieth of the paid-up capital to requisition a meeting), but they cannot restrict it.

Such a requisition must be signed by the requisitionists, and in case of joint holders of shares all the joint holders must sign (*l*). If the directors neglect for 21 days to call the meeting, any of the requisitionists holding more than half the voting power of the requisitionists may call it themselves.

All these meetings are general meetings, and similar business may be transacted at all of them.

Apart from special provisions in the Articles—

(a) **Every member is entitled to notice of a general meeting.**

Smyth v. Darley (1849), 2 H. L. Cas. 789

On an election of a treasurer for Dublin by the board of magistrates, notice was not sent to one of the board :—**Held**, the board were a corporate body, and the election was void.

(*i*) Companies Act, s. 131 (2).

(*k*) *Ibid.*, s. 132 which also provides for the manner in which the meeting shall be held.

(*l*) *Patent Wood Keg Syndicate v. Pearse*, [1906] W. N. 164.

But the Articles nearly always modify this rule, and provide that notices may be sent by post and need not be sent to members who have no registered address in the United Kingdom, etc. See Articles 131 and 134 of Table A (*post*, p. 390). Even if there is no such special article, the meeting will not be invalid merely because notices are not served on a few members living too far away to receive notice of the meeting in time (*m*).

(b) If special business is to be transacted, the notice must specify its nature.

Tiessen v. Henderson, [1899] 1 Ch. 861

A notice convening extraordinary general meetings to consider two alternative schemes of reconstruction of the company did not disclose that the directors were strongly interested as underwriters, etc., in one of the schemes:—**Held**, the notice was bad (*n*).

But notices are not construed very strictly.

Young v. South African Syndicate, [1896] 2 Ch. 268

The notice of a meeting stated that the object was to adopt new regulations instead of Table A, but did not set out the contents of the new regulations:—**Held**, this notice was good (*o*).

The notice must be sufficient to show the members substantially what is proposed to be done, *e.g.* a notice of a resolution to increase the capital should specify the amount of the proposed increase (*p*).

(c) A meeting once properly convened cannot be postponed by the directors (*q*).

(*m*) *Re Warden and Hotchkiss, Ltd.*, [1945] Ch. 270; [1945] 1 All E. R. 507.

(*n*) And see *Normandy v. Ind, Coope & Co.*, [1908] 1 Ch. 84, and *Ballie v. Oriental Telephone and Electric Co.*, [1915] 1 Ch. 503.

(*o*) And see *Bells & Co., Ltd., v. Macnaghten*, [1910] 1 Ch. 430 (a notice that a certain resolution would be passed "with such amendments as shall be determined on at the meeting" was held good).

(*p*) *MacConnell v. E. Prill & Co., Ltd.*, [1916] 2 Ch. 57.

(*q*) *Smith v. Paringa Mines*, [1906] 2 Ch. 193.

Length of Notice

A company's annual general meeting may be called by twenty-one day's notice in writing, and any other meeting, except a meeting for passing a special resolution may be called by fourteen days notice in writing. The articles cannot now provide for calling a meeting, except an adjourned meeting, by a shorter notice. A meeting called by a shorter notice is to be deemed to be duly called if it is so agreed (i) in the case of the annual general meeting, by all members entitled to attend and vote, and, (ii) in the case of any other meeting (except in the case of a special resolution) by a majority in number of the members holding not less than 95 per cent. in nominal value of the shares, giving a right to attend and vote at the meeting (r).

For certain purposes "Special Notice" is required, e.g. for removing a director (see p. 203, *ante*), or authorising a director of 70 to act (p. 205, *ante*). In such cases, twenty-eight day's notice must be given to the company of the intention to move the resolution and the company must give notice to the members (subject to some exceptions in cases of difficulty) at the same time and in the same manner as it gives notice of the meeting (s).

Quorum

The quorum for meetings of shareholders is generally fixed by the Articles. Table A (clause 53) fixes "three members present in person."

If Table A does not apply, and the Articles are silent—

- (a) in case of a private company **two members**.
- (b) in case of other companies **three members** must be present **personally** (*i.e.* not by proxy) (t).

(r) Companies Act, s. 133. The notice required seems to be 14 or 21 days *clear* notice, see note (t) p. 231.

(s) *Ibid.*, s. 142.

(t) *Ibid.*, s. 134 (c).

One member may be a quorum, if the articles so provide (*u*).

A representative appointed by a company (see p. 229) is a member "personally present," and may be counted in a *quorum* accordingly (*Kelantan Coco Nut Estates, Ltd.*, [1920] W. N. 274).

Chairman

The **chairman** is often appointed by the Articles ; if not, each meeting elects its chairman.

If the chairman prematurely closes the meeting, another chairman may be elected.

National Dwellings Society v. Sykes, [1894] 3 Ch. 159

General meeting called to pass the accounts and re-elect directors. The chairman proposed "that the accounts be passed." A shareholder moved an amendment that a committee of inquiry be appointed. The chairman refused to take the amendment. He put the original motion, which was lost, and then dissolved the meeting at once. The shareholders then appointed a new chairman and appointed a committee of inquiry :—**Held**, these appointments were good.

But the chairman has a discretion, and every shareholder is not entitled to talk as much as he likes.

Wall v. London Assets Corporation [1898]

14 T. L. R. 496

After a long discussion, several members still wanted to speak, the chairman moved that "the question be now put." and the resolution was passed :—**Held**, the resolution was properly passed.

Votes.—Unless the articles otherwise provide, each shareholder has

(*u*) *Re Fireproof Doors, Ltd.*, [1916] 2 Ch. 142, or where all the shares of the class are held by one person. *East v. Bennett Brothers, Ltd.*, [1911] 1 Ch. 163.

(a) on a show of hands, one vote ;

(b) on a poll, one vote for each share held (a).

But the Articles usually contain express provisions as to voting, and sometimes provide that the preference shares shall carry no voting rights.

Unless otherwise provided by the Articles, the person who appears on the register as the holder of a share is the only person entitled to vote in respect of it (b).

But he may be ordered by the court to vote in the manner indicated by some other person, e.g. by a mortgagor of shares (c).

The method of voting is as follows: The chairman first takes a show of hands. In this, each member present counts for one only, even if he holds proxies (*Ernest v. Loma Gold Mines, Ltd.*, [1897] 1 Ch. 1). The articles usually provide that a certain number of members may demand a poll; but now any provision in the Articles is void which excludes the right to demand a poll on any question other than the election of a chairman or adjournment, or which makes a demand for a poll on questions other than as aforesaid ineffective where it is made by not less than five members or by members representing not less than one-tenth of the total voting rights of all member entitled to vote at the meeting, or holding shares paid up to the extent of not less than one-tenth of the total sum paid up on all the shares conferring a right to vote at the meetings (d).

The same rule now applies in the case of an extraordinary or special resolution (e).

(a) Companies Act, s. 134 (e).

(b) *Wise v. Lansdell*, [1921] 1 Ch. 420.

(c) *Puddephatt v. Leith*, [1916] 1 Ch. 200.

(d) Companies Act, s. 137.

(e) s. 117 (4) of the Act of 1929 was repealed by s. 4 (3) of the Act of 1947.

On a poll a member holding several shares may vote in one way in respect of some of those shares and in another way in respect of others (f).

When a poll has been duly demanded, the chairman fixes the time and place for taking the poll. He may declare that it shall be taken then and there, unless the Articles provide otherwise. But he must not declare that it shall be taken in any way inconsistent with the regulations, e.g. by voting papers (*McMillan v. Le Roi Mining Co., Ltd.*, [1906] 1 Ch. 331).

When the poll is taken, each person voting signs a paper "for" or "against" the resolution, and proxies are counted.

A proxy is a person appointed to vote at a meeting for a shareholder (g). A proxy is appointed by a written authority (the document is sometimes called a proxy, but is, more properly, a proxy paper), authorising a person to vote as proxy for a shareholder at a certain meeting (it should be stamped 1d.) and may authorise the proxy to vote at a series of meetings. (If so, it must be stamped 10s.) (h).

The Articles usually provide that proxy papers shall be deposited at the office before the meeting; if not, the person voting is not bound to prove at the meeting his authority to vote, and his vote ought to be accepted, even if he cannot produce the proxy paper at the time.

Re English, Scottish and Australian Bank,
[1893] 3 Ch. 385

The bank had its principal business in Australia. A reconstruction scheme was proposed. The judge ordered that the appointment of proxies by Australian shareholders should be notified by telegraph:—Held, the proxies were validly appointed, though the proxy papers could not be produced at the meeting.

(f) Companies Act, s. 138. This is to meet the case of trustees.

(g) *Cousins v. International Brick Co., Ltd.*, [1931] 2 Ch. 90, at pp. 101, 102.

(h) *Isaacs v. Chapman*, [1916] W. N. 28; 32 T. L. R. 237

Any member entitled to attend and vote at a meeting is entitled to appoint another person, whether a member or not, as his proxy. In the case of a private company, the person so appointed has the right to attend and speak at the meeting, but not more than one proxy can be appointed to attend any one meeting. A proxy can only vote on a poll, not on a show of hands. Notices calling a meeting must contain a statement that a member can appoint a proxy as above (i).

An instrument appointing a proxy confers authority to demand a poll (k).

Any provision in the Articles is void which requires the instrument appointing a proxy to be received by the company more than forty-eight hours before the meeting (k).

The authority to vote by proxy may be revoked before the person appointed to act as proxy has voted, and the shareholder may himself vote if present at the meeting, without having previously revoked the appointment of the proxy (g).

If another paper is afterwards signed appointing another person as proxy, the later appointment revokes the first (l).

If a proxy paper is signed for a particular meeting, the date of the meeting may be filled in afterwards (m).

The cost of obtaining the signature of proxy papers may be paid out of the funds of the company (n). But

(i) Companies Act, s. 136.

(k) *Ibid.*, s. 137 (2).

(l) Storey on Agency, 9th edn., s. 474.

(m) *Sadgrove v. Bryden*, [1907] 1 Ch. 318.

(n) *Peel v. London and North-Western Rail. Co.*, [1907] 1 Ch. 5.

if invitations to appoint particular persons as proxies are so sent to some members of the company, they must be sent to all (o).

If a company is a member of another company, it may appoint a representative to vote (p).

The appointment of the representative may be proved by producing a copy of the resolution appointing him (q).

A corporation which is a shareholder is usually required to appoint its proxies under seal. But this is not required if the corporation has not got a seal (q).

During war the voting rights of shareholders, who are alien enemies, are suspended (r).

Adjournment.—As a general rule, an adjourned meeting is treated as a continuation of the original meeting (s); but any resolution passed at an adjourned meeting must be treated as having been passed on the date on which it was in fact passed (t).

SECTION 2

Resolutions

Resolutions are of three kinds :

1. **Ordinary.**—That is, a resolution passed by a majority of persons present at a general meeting. The resolution is passed in the ordinary way and entered in the minute book by the chairman. The chairman's entry of an ordinary resolution is evidence that it has been properly passed (a).

(o) Companies Act, s. 136 (4).

(p) Companies Act, s. 139.

(q) *Colonial Gold Reef, Ltd. v. Free State Rand, Ltd.*, [1914] 1 Ch. 382.

(r) *Robson v. Premier Oil Co.*, [1915] 2 Ch. 124.

(s) *Spencer v. Kennedy*, [1926] Ch. 125.

(t) Companies Act, s. 144.

(a) Companies Act, s. 145.

Notice of intended resolutions.—Members representing one-twentieth of the total voting rights of all the members having a right to vote at the meeting, or not less than 100 members holding shares on which there has been paid-up an average sum per member of not less than £100, can claim by requisition at their own expense, to have notice of any resolution which is intended to be moved at the meeting and to receive any statement of not more than 1,000 words with respect to the business to be dealt with at the meeting.

A copy of the requisition signed by the requisitionists, must be deposited at the registrar's office not less than six weeks before the meeting, where it requires notice of a resolution and in other cases, one week before the meeting. A reasonable sum for expenses must also be deposited (b). The requisition must comply with the requirements of s. 140 (4) and there are some exceptions set out in s. 140 (4) and (5).

2. Extraordinary resolutions.—An extraordinary resolution is a resolution passed by a three-quarters majority of the number of votes cast for and against the resolution at a general meeting, of which notice specifying the intention to propose the resolution “**as an extraordinary resolution**” has been given (c). It may be used to wind up a company voluntarily on the ground that it cannot continue its business by reason of its liabilities, and that it is advisable to wind it up (d). The Articles usually provide that directors may be removed by extraordinary resolution.

3. Special resolutions.—These are necessary for the following purposes among others—

(a) to alter the Articles of the company ;

(b) *Ibid.*, s. 140.

(c) Companies Act, s. 141. *MacConnell v. Prill (E.) & Co., Ltd.*, [1916] 2 Ch. 57.

(d) Companies Act, s. 278 (1) (c).

- (b) to alter the Memorandum ;
- (c) to change the name of the company with the consent of the Board of Trade ;
- (d) to reduce the capital with leave of the Court ;

A special resolution must be passed by a **three-quarters majority** of the votes cast for and against the resolution (c).

Notice of meeting to pass special resolution.—Not less than **twenty-one clear (e) days'** notice must be given, specifying the intention to propose the resolution "**as a special resolution**" (f).

The declaration by the chairman that an extraordinary or special resolution has been carried is "**conclusive,**" unless a poll is demanded (g).

Re Hadleigh Castle Gold Mines, [1900] 2 Ch. 419

A meeting was held to pass an extraordinary resolution to wind up the company. The chairman declared that it was carried on a show of hands. No poll was demanded. A shareholder afterwards contended that it had not been passed by a three-quarters majority :—**Held**, the chairman's declaration is conclusive, and the court cannot go into the question.

But the chairman's declaration will not make a resolution good if the declaration itself shows that it was bad.

Re Caratal New Mines, Ltd., [1902] 2 Ch. 498

A special resolution for reconstruction was proposed. The chairman put the question. Then he said, "Those in favour, 6 ; against 23 ; but there are 200 voting by proxy,

(e) *Re Hector Whaling, Ltd.*, [1936] Ch. 208. The Articles cannot alter the length of notice required ; but they may provide when the notice is to be deemed to be served.

(f) Companies Act, s. 141 (2).

(g) *Ibid.*, s. 141 (3).

and I declare the resolution carried " :—**Held, proxies cannot be counted on a show of hands**, therefore the declaration was, on the face of it, illegal, and the resolution was void.

The meeting may be convened on less than twenty-one days notice, if it is so agreed by a majority in number of the members having a right to attend and vote at the meeting, holding not less than 95 per cent. in nominal value of the shares giving that right (*f*).

If all the members of the company are present and vote for the resolution, it will be valid, in spite of informalities, at any rate in the case of an ordinary resolution (*h*).

A printed copy of every special resolution and of every extraordinary resolution must be sent to the Registrar within fifteen days (*i*).

Amendments.—When a resolution has been moved, an amendment may be put, if it is within the business covered by the notice convening the meeting, but not otherwise (*k*).

SECTION 3

Minutes

A company must cause minutes of all meetings to be kept in minute books. Any minute signed by the chairman is *prima facie* evidence of the proceedings. Where minutes have been properly made, the meeting is deemed to have been duly held, unless the contrary is

(*h*) *Re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466. This was extended to an extraordinary resolution in *Re Oxford Motor Co.*, [1921] 3 K. B. 32; but it is doubtful how far the provisions of the Article can be waived in the case of a special or extraordinary resolution.

(*i*) Companies Act, s. 143. The notice need not be printed in the case of an "exempt private company." See p. 253, *post*.

(*k*) *Teece & Bishop, Ltd.*, [1901] W. N. 52.

proved (*m*). The minute books of general meetings must be kept at the registered office, and must be open to the inspection of members free. Members may also require copies of the minutes at a charge of not more than 6d. per 100 words (*n*).

Minutes need not now be kept in bound books provided adequate measures are taken to provide against falsification (*o*).

(*m*) Companies Act, s. 145.

(*n*) *Ibid.*, s. 146.

(*o*) Companies Act, s. 436. For the penalties for failure to take these measures, see s. 436 (2). Loose-leaf books were not sufficient under the Act of 1929, see *Hearts of Oak Assurance Co. v. Flower & Sons*, [1936] Ch. 76.

CHAPTER XVII

ACCOUNTS AND AUDITORS

SECTION 1

Accounts

EVERY company must keep proper books of account with respect to—

- (a) all receipts and expenses, and the matters to which they relate ;
- (b) sales and purchases of goods ;
- (c) assets and liabilities ;

and they must be sufficient to give a true and fair view of the state of the company's affairs and to explain its transactions (a).

The account books must be kept at the registered office or some other place appointed by the directors. They must not be kept outside Great Britain, unless returns of the business dealt with in those books are sent to Great Britain sufficient to disclose the financial position of that business every six months and to enable the directors to prepare the next profit and loss account and balance sheet, in the manner required by the Act (b), and must be open to inspection by the directors. The directors must in every year lay before the company in general meeting a **profit and loss account** and a **balance sheet**. A report of the directors must be

Companies Act, s. 147. (b) *Ibid.*, s. 147 (3).

attached to the balance sheet as to the state of the company's affairs, the amount recommended to be paid by way of dividend, and the amounts to be carried to reserve.

The profit and loss account must be made up to a date not more than nine months before the date of the meeting, and must give a true and fair view of the profit or loss of the company for the financial year (c).

The balance sheet must give a true and fair view of the state of affairs of the company at the end of its financial year and must comply with the requirements of the Eighth Schedule to the Act (d).

The requirements of the Eighth Schedule as to the contents of the balance sheet and profit and loss account vary very much according as the company is a normal company with individual shareholders, or whether it holds all or most of the shares in other companies which it controls. In this case the former company is called a "holding company" and the controlled companies are called "subsidiaries."

A company is a "subsidiary company" of another if the other (*i.e.* the controlling company) is a member of it and controls the composition of its board of directors or holds more than half in nominal value of its "Equity" share capital; or if it is a subsidiary of a third company which is a subsidiary of the controlling company.

"Equity" share capital means the issued share capital, excluding shares which as regards both dividends and capital carry no right to participate beyond a specified amount in a distribution (e).

(c) *Ibid.*, s. 149.

(d) *Ibid.*, s. 149.

(e) Companies Act, s. 154.

In the case of a normal company, Part I of the Eighth Schedule applies (*f*).

Subject to some exemptions and modifications where the information would be immaterial or would cause unnecessary expense, and to modifications which may be made from time to time by the Board of Trade, the balance sheet must show :—

(1) The authorised share capital and the issued share capital.

(2) The preliminary expenses.

(3) The expenses of any issue of shares or debentures.

(4) The reserves, provisions for unknown liabilities, liabilities and fixed and current assets, which must be classified under appropriate headings, the fixed assets being distinguished from current assets.

(5) The method used to arrive at the amount of the fixed assets. The method, in ordinary cases, must be to take the difference between the cost or valuation in the company's books and the aggregate amount provided or written off since the date of the acquisition or valuation for depreciation ; but this is not to apply to investments, the market value of which is disclosed, or to goodwill, patents or trade marks.

(6) The aggregate amounts of capital reserves, revenue reserves and provisions (other than depreciation).

(7) The source from which any increase in the amount of capital reserves has been derived, and, where they

(*f*) The provisions of the Eighth Schedule are very long and complicated, the pages which follow contain only a summary of them. Any one concerned in preparing a balance sheet and profit and loss account must of course consult the context of the Eighth Schedule. See appendix, p. 416. *post*.

have decreased, the application of the amount by which they have been decreased.

(8) Under separate headings, the aggregate amounts of the trade investments, other quoted investments and other unquoted investments, the total amount of the goodwill, patents and trade marks (if not otherwise shown), the amount of bank loans and overdrafts and the amount which is recommended for distribution by way of dividend.

(9) The nominal amount of any debentures of the company held by a nominee or trustee for the company.

(10) The following matters, which may be stated by way of note or in an annexed statement or report :—

- (i) the number of shares which any one has an option to subscribe for, with the period of exercise of the option and the price to be paid ;
- (ii) the arrears of any fixed cumulative dividends and the period for which they are in arrears ;
- (iii) particulars of any charges on the company's assets ~~to~~ secure the liabilities of any other persons ;
- (iv) the general nature of other contingent liabilities ;
- (v) the amount or estimated amount of contracts for capital expenditure ;
- (vi) if the directors think that any assets have no value or would not realise the values stated, this must be stated ;
- (vii) the market value of investments where it differs from the Stock Exchange value.
- (viii) the basis on which foreign currencies have been converted into sterling ;

- (ix) the basis on which any amount set aside for income tax is computed.
- (x) except in the case of the first balance sheet, the corresponding amounts of each item shown at the end of the preceding financial year.

The **profit and loss account** must show the amounts

- (a) charged to revenue by way of provision for depreciation for renewals or diminution in value of fixed assets ;
- (b) of the interest on the debentures and other fixed loans ;
- (c) of the charge for income tax and other taxation on profits ;
- (d) provided for redemption of share capital or loans ;
- (e) to be set aside or withdrawn from reserves ;
- (f) set aside for other provisions ;
- (g) of income from investments, distinguishing between trade investments and other investments ;
- (h) of the dividends paid and proposed.

The following may be stated by notes—

- (i) any special method of depreciation adopted ;
- (ii) the basis on which the charge for income tax is computed ;
- (iii) corresponding amounts for previous years ;
- (iv) the way in which any items are affected by unusual transactions or any change in the method of accounting.

.In case of a **holding company**, “ group accounts ” dealing with the state of affairs and profit and loss of

the company and its subsidiaries must be laid before the company in general meeting when the company's own balance sheet and profit and loss account are so laid, unless the company is a wholly owned subsidiary of another company or where it would be impracticable or misleading in the opinion of the directors, with the approval of the Board of Trade (g).

The group accounts are to be consolidated accounts comprising a consolidated balance sheet dealing with the state of affairs of the company and all its subsidiaries and a consolidated profit and loss account dealing with the profit or loss of the company and its subsidiaries (h).

The group accounts must give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries, dealt with as a whole, and must comply with the requirements of the First Schedule or give the same or equivalent information, with power to the Board of Trade to make modifications (i).

The holding company's directors must arrange, where possible, that the financial year of each subsidiary company shall coincide with the company's own financial year (k).

The provisions of Part I of the Schedule apply subject to the modifications set out in Part II of the Eighth Schedule. These include the following—

- (1) Investments in subsidiaries need not be stated where they have been separately stated under the provisions of the Act.
- (2) The amount and description of shares and debentures of the company held by its subsidiaries or their nominees, may be stated in a note or annexed report.

(g) Companies Act, s. 150. (h) *Ibid.*, s. 151.

(i) Companies Act, s. 152. (k) *Ibid.*, s. 153.

In the case of a **subsidiary company**, the balance sheet must show the amount of its indebtedness to all companies of which it is a subsidiary and their indebtedness to it.

The consolidated balance sheet and profit and loss account of a holding company and its subsidiaries must combine the information contained in the separate balance sheets and profit and loss accounts of the holding company and its subsidiaries and must as far as practicable comply with the provisions of the Act as if they were the accounts of an actual company. It is not, however, necessary to set out in the consolidated accounts, details of the directors or their emoluments or pensions or compensation for loss of office, nor details as to capital reserves. There are some exceptions in the case of banking and discount companies and assurance companies.

Subject as above mentioned, the amounts of all loans to officers of the company must be shown in a company's balance sheets, and this applies to a loan to any person who has, during the company's financial year been a director or officer of the company, made before he became a director or officer, and applies to loans made by a subsidiary of the company or under a guarantee from or a security provided by a subsidiary (*l*).

Loans to directors are now illegal except in special cases (see p. 211, *ante*).

The accounts laid before the company must also show :

(i) The aggregate amount of the directors' "emoluments," paid in respect of their services as directors of the company or of its subsidiary or otherwise in connection with the management of the affairs of the company or any subsidiary thereof.

(*l*) Companies Act, s. 197.

(ii) The aggregate amount of directors' or past directors' pensions, and

(iii) The aggregate amount of any compensation to directors or past directors in respect of loss of office.

"Emoluments" include fees and percentages and sums paid by way of expenses allowance (m).

The balance sheet must be signed by two directors (or one, if there is only one) (n). The auditor's report must be attached to the balance sheet and read to the company in general meeting (o).

The accounts should be kept in a manner which prudent business people would adopt (p).

The accounts are presented and passed at the annual general meeting (q).

A copy of the balance sheet, including the directors' reports and all statements and accounts which have to be attached to the balance sheet, and a copy of the auditor's report must be sent to every member of the company, not less than twenty-one days before the general meeting. This applies to a private company (a).

Every member of the company whether or not he is entitled to receive notices of general meetings, is to be entitled to have sent to him on demand, free of charge, a copy of every balance sheet and the documents which are required to be annexed to it and the auditor's report; and this provision is now made applicable to a private company (b).

Forms of balance sheet and profit and loss account are printed in the appendix, p. 432 *et seq.*, *post.* The

(m) Companies Act, s. 196.

(n) *Ibid.*, 155.

(o) *Ibid.*, s. 156 (1).

(p) *Hinds v. Buenos Ayres Grand National Tramways Co.*, [1906] 2 Ch. 654.

(q) Companies Act, s. 148.

(a) Companies Act, s. 158.

(b) *Ibid.*, s. 158 (2).

first (p. 432), is appropriate to a normal or single company. The second (p. 438), is appropriate to a holding company with subsidiaries.

As regards the first or more simple form the following points should be specially noted :

In order to show what profit has been made in the year, the amount of capital subscribed must be shown. If it can be shown that the net assets amount to more than this sum, the balance is profit. Besides the subscribed capital, any moneys paid to reserve funds, etc., in previous years must be accounted for and debts owed by the company must also be deducted from the assets.

On the other side is set out the value of the assets. Notice that deduction is made in the case of the leaseholds and plant, for depreciation. As the assets exceed the liabilities, the balance is written under the latter head. So much for the capital account.

The profit for the year is arrived at in the **profit and loss** account.

The total amount of the trading profit for the year is stated. From this are deducted directors' fees, etc. leaving a balance. Out of this are paid dividends on preference shares, interest on debentures, and amounts put by as reserve for the year, and the balance is profit which may be divided among the shareholders by declaring a dividend of (say) 5 per cent. on the ordinary shares, leaving a balance to be carried over to the next year.

Any reader likely to be concerned with accountancy and the balance sheets, especially of holding companies, should check the forms of balance sheet and profit and loss accounts with the details of the Eighth Schedule.

SECTION 2

Auditors

The Articles usually provide for the appointment of auditors and the auditing of the accounts of the company. But apart from any such provision, the Companies Act provides as follows :

A company must at each annual general meeting appoint an auditor or auditors and they must be appointed to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting and a retiring auditor may be reappointed without any resolution being passed, unless he is not qualified or a resolution has been passed at the meeting that he should not be re-appointed or he has given notice in writing of his unwillingness to be appointed.

Where at an annual general meeting no auditor is appointed or re-appointed, the Board of Trade must appoint a person to fill the vacancy.

When this arises the company must within one week, send notice to the Board of Trade.

Special notice must be given (c) of an intention to nominate a person other than the retiring auditor at the annual general meeting. A resolution that a retiring auditor shall not be re-appointed without the appointment of any other person requires the same notice.

The company must give notice to a retiring auditor of an intended resolution that he shall not be re-appointed forthwith after receipt by the company of the notice of the resolution.

Where such a notice has been given and the auditor makes representation in writing to the company and requests their notification to members of the company, the company shall in the notice of the resolution given to members state the fact of the representation having been made, and send a copy of the representation to every member to whom notice of the meeting is sent, and, if not, the auditor may require the representation to be read out at the meeting (d).

(c) See p. 224, *ante*.

(d) Companies Act, ss. 159, 160.

The first auditors can be appointed by the directors, but subject to the power of the company in general meeting to remove them (e).

A person cannot be appointed an auditor of a company unless he is a member of a body of accountants established in Great Britain and recognised for this purpose by the Board of Trade, or authorised by the Board of Trade to be so appointed ; and the following persons are disqualified from acting as auditors :

- (a) a director, officer or servant of the company (except an auditor) ;
- (b) a person who is a partner or in the employment of a director or officer of the company (this now applies to private companies unless exempted) ;
- (c) a body corporate ;
- (d) a person who is disqualified for appointment as auditor of a subsidiary or holding company (f).

The auditors are entitled to have access to the books and accounts and vouchers of the company, and may require all such information and explanations from the officers of the company as they think necessary for the performance of their duties, and they have the right to attend **any** general meeting of the company and to receive all notices and other communications relating to any general meeting which any member of the company is entitled to receive and to be heard at any general meeting on any part of the business which concerns them as auditors (g),

(e) Companies Act, s. 159 (5).

(f) *Ibid.*, s. 161.

(g) Companies Act, s. 162 (3) and (4).

The court will not always order the company to produce its books to the auditors, *e.g.*, if there is a dispute between the company and the auditors, and it is not proved that the company intends to continue their appointment as auditors (*h*).

Duties of Auditors (see notes, pp. 246-248).—The auditors' duties are—

(1) To **make a report** to the members (*i*). They must report on the accounts and on every balance sheet, profit and loss account and group account laid before the company during their tenure of office and their report must state whether—

- (i) they have obtained all the information and explanations which were necessary for their audit ;
- (ii) proper books of account have been kept and proper returns received from the branches ;
- (iii) the profit and loss account and balance sheet are in agreement with the books ;
- (iv) the accounts give the information required by the Companies Act and give a true and fair view of the company's affairs (*j*), and its profits and losses.

The auditors' report must be attached to the balance sheet (*k*) and must be **read before the company in general meeting**. Members are entitled to inspect the report (*l*).

If the balance sheet does not show the amount of loans to the officers or the remuneration of the directors,

(*h*) *Cuff v. London & County Land and Building Co., Ltd.*, [1912] 1 Ch. 440.

(*i*) Companies Act, s. 162. Usually it is sufficient to send the report to the Secretary; *Re Allen, Craig & Co., (London), Ltd.*, [1934] Ch. 483.

(*j*) Companies Act, s. 162 and Sched. IX

(*k*) Companies Act, s. 156.

(*l*) Companies Act, s. 162 (2)

the auditors must include these in their report (sect. 197 (3)).

Newton v. Birmingham Small Arms Co., Ltd.
[1906] 2 Ch. 378

The directors resolved to create a secret reserve fund, the existence and purposes of which were not to be disclosed by the auditors to the company: **Held**, the resolution was bad, as the auditors would be bound to disclose the facts.

(2) To make himself acquainted with his duties under the company's Articles and under the Companies Act (*m*).

But he is not bound to be a legal expert (*m*).

(3) He must be honest and must exercise reasonable care; otherwise he may be sued for damages.

It is not his duty to give advice, and he has nothing

Notes of Cases on the Duty of Auditors ()*

(*m*) *Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139. The company's Memorandum provided for payment of underwriting commissions. Their Articles incorporated Table A (1906), which does not provide for payment of such commissions and also does not expressly permit a director to contract with the company.

The company paid certain sums for underwriting commission and also paid profit costs to one of its directors who was a solicitor. The auditor passed these items in the balance sheets, relying on the power given in the Memorandum, and knowing that the solicitor was not a director when the company was formed, and their legality had been discussed at a meeting of shareholders, who had subsequently approved the balance sheet.

Held, "Auditors of a limited company are bound to know and make themselves acquainted with their duties under the Articles of the company whose accounts they are appointed to audit, and under the Companies Acts for the time being in force; and when it is shown that audited balance sheets do not show the true financial condition of the company and that damage has resulted, the onus is on the auditors to show that this is not the result of any breach of duty on their part." In the special circumstances of this case the auditor was not liable; but the court, not being entirely satisfied with the way the audit was conducted as regards the payments to the director dismissed the summons without costs.

(*) These notes are intended for the use of accountants and others specially interested in this question.

to do with the way in which the business is carried on (*n*); nor is he bound to be a detective, but is justified in believing tried servants of the company and in assuming that they are honest, provided he takes reasonable care (*o*). On the other hand, if there is anything calculated to excite suspicion, he should probe it to the bottom (*o*), and he must not confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but should ascertain by comparison with the books of the company that it was properly drawn up so as to show the correct financial position (*p*).

(*n*) *Re London General Bank* (No. 2), [1895] 2 Ch. 673. The greater part of the capital of the company was advanced on loan to the Liberator and other Balfour companies upon securities which were insufficient and difficult to realise. For several years the auditors pointed out to the directors the unsatisfactory nature of these securities; but the auditors' report to the members on the balance sheet only stated that "the value of the assets as shown on the balance sheet is dependent on realisation." On the faith of this balance sheet dividends were declared, which were really paid out of capital:—Held—(1) It was nothing to the auditor whether the business of the company was being conducted prudently or imprudently, profitably or unprofitably, . . . provided he discharged his own duty to the shareholders. (2) His duty was to ascertain the true financial position of the company and to report to the shareholders. The auditors had failed in this, and were liable.

(*o*) *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279. The value of the company's stock-in-trade was grossly overstated for several years in the balance sheets, and the directors were thus enabled to pay dividends out of capital. The auditors accepted the certificate of the manager (a business man of high repute) as to the value of the stock. The auditors did not examine the books; if they had done so, and had added to the value stated in the previous year the amount spent on stock and deducted the amount received from sales, they would have seen that the valuation required explanation:—Held, the auditors were not liable: it was no part of their duty to take stock.

(*p*) *Leeds Estate Co. v. Shepherd* (1887), 36 Ch. D. 787. The Articles provided that the Directors should receive remuneration only if the dividends exceeded 5 per cent. The manager prepared a delusive balance sheet, which enabled the directors to declare dividends of over 5 per cent. and pay themselves their remuneration. The auditor did not look at the Articles or at the books of the company, but accepted the statement of the manager, and certified the accounts "to be a true copy of those shown in the books of the company." The dividends were in fact paid out of capital:—Held, the auditor was liable.

The auditor should see that the moneys and securities of the company are actually in the possession of the company, or have been deposited for safe custody with a bank or in other proper custody.

An auditor has been held not to be justified in accepting a certificate of the company's brokers that they held certain securities on behalf of the company without production of the securities (*q*).

An auditor, if formally appointed by the Articles or under section 159 of the Companies Act, is an "officer" of the company, and liable to be proceeded against for misfeasance under section 333.

But an auditor informally appointed is not such an officer.

Re Western Counties Bakeries Co., [1897] 1 Ch. 617

The Articles provided for the appointment of auditors in general meeting. P. and R. were employed as auditors on two occasions, but were never formally appointed :—**Held**, they could not be made liable as "officers" of the company.

Provisions in the articles that the auditors and other officers of the company are only to be liable in case of their own wilful default would protect the auditors under the Act of 1908, unless the auditors knew that they were neglecting their duties (*r*), but now any such provisions are void (*s*). The court may, however,

(*q*) *City Equitable Fire Insurance Co.*, [1925] Ch. 407. In this case the true position of the company was concealed by the chairman from the shareholders and the other directors. The steps taken by the auditors, and the extent to which those steps fell short of the proper measure of care to be expected from the auditors, were fully discussed by ROMER, J., at pp. 478 to 499, and this part of the judgment should be carefully studied by any student interested in the position of auditors.

(*r*) *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407. But see *Re Fulkon & Co.*, [1932] N. I. 35; where an auditor who had failed to audit and report on the balance sheets in the manner required by law was held liable, the failure being held to be a wilful default.

(*s*) Companies Act, s. 205.

relieve the auditors (whether they are officers of the company or not) if they have acted honestly and reasonably, and ought, in all the circumstances, fairly to be excused (*t*).

Remuneration.—The remuneration of an auditor is fixed by the general meeting unless he is appointed by the directors or by the Board of Trade, in which case the directors or the Board of Trade must fix the remuneration, and any sum paid in respect of the auditor's expenses is to be included in the remuneration so fixed (*u*).

Auditors are agents for the shareholders: but the shareholders are not necessarily bound by notice of everything of which notice is given to the auditors (*v*).

(*t*) *Ibid.*, s. 448.

(*u*) *Ibid.*, s. 159 (*7*).

(*v*) *Spackman v. Evans* (1868), L. R. 3 H. L. 171, 196, 235.

CHAPTER XVIII

PRIVATE COMPANIES

“ A private company ” is defined by the Companies Act to mean a company which by its articles

- (a) restricts the right to transfer its shares
- (b) limits the number of its members (exclusive of persons who are or have been in the employment of the company) to fifty ; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company (a).

Several joint holders of a share are for the purposes of this definition treated as one member (b).

The Act does not specify in what manner the right to transfer shares must be restricted. It is probably sufficient if the right is so restricted that the directors can prevent the number of members from being increased beyond fifty.

If a private company alters its articles so that they do not contain the necessary provisions, the company ceases to be a private company, and must within fourteen days deliver to the Registrar a statement in lieu of prospectus in the form set out in the Third Schedule to the Act. There are penalties in case of default (c).

If a private company fails to comply with any of these provisions, it ceases to be entitled to some of the privileges of a private company as regards including a balance sheet in the annual return and carrying on

(a) Companies Act, s. 28

(b) *Ibid.*, 28 (2)

(c) *Ibid.*, s. 30.

business with less than seven members. But the court may grant relief, if the default was due to accident, inadvertence or other sufficient cause (*d*).

Usually all the shares of a private company are held by a few persons, frequently members of the same family.

It is often convenient for a person or partnership to turn a business into a private company. This is done by forming a private company and selling the business to the company. The consideration is usually the allotment of shares to the sellers of the business, credited as fully paid.

The result is to limit the liability of the former owner or owners in case of loss and to make a division of profits and interests in the business more easy to accomplish.

Legally, the position of a private company is in most respects the same as that of a public company (*e*), and, even if one member holds practically all the shares, the company is a distinct "being" or "person" (see *Salomon v. Salomon & Co., Ltd.*, *ante*, p. 5).

Thus the company is not bound by notice of matters which are in the knowledge of the one important member (see *The "Birnam Wood"*, [1907] P. 1).

It is sometimes difficult to say whether a company has issued "an invitation to the public" or not; but the test seems to be that the invitation must have been issued—

- (1) by the company itself (*f*); and
- (2) to any person who chose to apply for the shares,

(*d*) Companies Act, s. 29.

(*e*) e.g. for purposes of apportionment of dividends. *Re White*, [1913] 1 Ch. 231.

(*f*) Thus in *Booth v. New Afrikaner Gold Mining Co., Ltd.*, [1903] 1 Ch. 295, at p. 315, it was held that an offer by the liquidator of an old company, of shares in a new company, was not an offer to the public within s. 8 of the Act of 1900. And see *Burrows v. Matabele Gold Co.*, [1901] 2 Ch. 23.

or to a considerable class of persons selected as being the most likely subscribers (g).

**Sherwell v. Combined Incandescent Syndicate,
Ltd., [1907] W. N. 110**

The directors printed a thousand copies of a prospectus headed "Strictly private and confidential: not for publication," and some were distributed by the directors among their friends:—Held, this was *not* an invitation to the public.

**South of England Natural Gas Co., Ltd.,
[1911] 1 Ch. 573**

Prospectus headed "For private circulation only" but filed with the Registrar. 3,000 copies sent out, but only to shareholders in certain gas companies:—Held, this *was* an invitation to the public.

These decisions have now been modified or explained. "Public" includes any section of the public whether selected as members or debenture holders of the company or as clients of the person issuing the prospectus or in any other manner, but not where the offer can in all the circumstances be properly regarded as a domestic concern of the persons making and receiving it (h).

Special provisions relating to private companies.

(1) A private company may consist of two members only (k).

(2) A private company must send with the annual return required by sect. 124, a certificate signed by a director or the secretary that the company has not issued any invitation to the public to subscribe for shares or debentures, and, if the number of members exceeds fifty, a certificate that the excess consists of employees or past employees of the company (l).

(g) See also *Nash v. Lynde*, p. 55, *ante*.

(h) Companies Act, s. 55.

(k) *Ibid.*, s. 1.

(l) *Ibid.*, s. 128 and Sched. VI.

(3) The annual summary must now include a balance sheet (*m*), and other documents as in the case of a public company (see pp. 83, 84, *ante*). Unless the company is "an exempt private company." This means a company which fulfils certain conditions and sends a certificate with its annual return that these conditions are satisfied.

The most important of these conditions are—

- (i) that no company or other body corporate is the holder of any of the company's shares or debentures and no person other than the holder has any interest in any of the company's shares or debentures ;
- (ii) that the number of persons holding debentures of the company is not more than 50, and
- (iii) that no company or other body corporate is a director of the company and that there is no arrangement whereby the policy of the company is capable of being determined by persons other than directors, members and debenture holders or trustees for debenture holders (*n*).

The object of this new provision is to prevent a large holding company with hundreds of shareholders from evading disclosure of the true state of its affairs by carrying out all its operations through subsidiary companies, each having, say, two shareholders, the holding company and a nominee. The subsidiary companies thus became private companies and (before 1948) need not disclose their balance sheets in their annual returns.

(4) The company need not hold a statutory meeting (*o*) (see p. 220).

(5) Directors need not deliver to the Registrar a

(*m*) *Ibid.*, s. 129.

(*n*) *Ibid.*, Sched. VII.

(*o*) *Ibid.*, s. 130 (10).

consent to act or sign the Memorandum or a contract for their qualification shares (*p*) (see p. 195).

(6) A statement in lieu of a prospectus need not be registered even though no prospectus is issued (*q*).

But a private company must deliver to the Registrar a statement in prescribed form, if it wishes to pay underwriting commission (*r*).

(7) The provisions of the Act as to the minimum subscription do not apply, and shares can therefore be allotted irrespective of the number of shares subscribed (*s*).

(8) A private company may commence business immediately it is incorporated notwithstanding that no minimum subscription has been subscribed or that the directors have not paid the proper proportion on their shares (*t*).

The balance sheets and profit and loss accounts must now be sent to the shareholders (*u*).

The Articles of Association of a private company usually contain special provisions (*v*), and for the purpose of obtaining the privileges of a private company should provide as follows :—

(1) The transfer of shares should be restricted, e.g. so that shares can only be transferred to members or the sons or daughters, etc., of members (*a*).

(*p*) Companies Act, s. 181 (5).

(*q*) *Ibid.*, s. 48 (3).

(*r*) *Ibid.*, s. 53 (1) (c) (ii); and see Board of Trade (Forms) Order, Form 58.

(*s*) Companies Act, s. 47; and see p. 60, *ante*.

(*t*) *Ibid.*, s. 109 (7); and see p. 61, *ante*.

(*u*) *Ibid.*, s. 158 (4); and see p. 241, *ante*.

(*v*) See Palmer's Company Precedents, 15th edn., vol. i, pp. 867 *et seq.*

(*a*) *A.-G. v. Jameson*, [1904] 2 I. R. 644.

(2) The number of members (exclusive of employees and ex-employees) should be limited to 50.

(3) Invitations to the public to subscribe for shares or debentures should be prohibited.

(4) If it is intended to give some of the shares to employees, a provision is sometimes inserted that they must transfer their shares if they leave the employment of the company or are dismissed. This, however, is not necessary, since ex-employees are excluded from the limit of 50 members (b).

(5) The vendor or chief member is often made governing director for life, and other directors are exempted from the usual provisions under which directors retire by rotation, etc.

(6) Share warrants should not be authorised.

Sometimes the company adopts table A as its Articles with modifications. This is, however, most inconvenient in practice, and it is better to adopt a short form of Memorandum and Articles complete in themselves.

A "Syndicate" is the name usually given to a company composed of a few members formed for the purpose of exploring or investigating the value of some property and of selling it, if satisfactory, to a larger company, or for some other temporary purpose.

Syndicates are usually limited companies and may be either public or private.

(b) Companies Act, s. 28 (1) (b).

27/11/56

CHAPTER XIX

SECTION 1

GUARANTEE COMPANIES

THERE are many cases in which associations of persons wish to have the advantages of forming an incorporated company without having to subscribe for shares and without incurring a heavy liability. Clubs, trade associations, and societies for promoting various objects, are examples of this.

For this purpose a company can be formed with liability limited by guarantee. Each member undertakes to contribute a certain sum if the company is wound up.

e.g. each member may undertake to subscribe 1s. in the event of the company being wound up.

The advantages are that the company becomes a corporation which can own property and enter into contracts and take or defend legal proceedings, and the members of its council or board of directors have no personal liability."

Many of these associations obtain permission of the Board of Trade to dispense with the word "limited." See p. 20, *ante*.

A company limited by guarantee need not necessarily have any capital at all.

The Memorandum of Association contains a declaration of the guarantee, but does not usually contain any statement as to the amount of capital. In other respects,

the Memorandum and Articles are similar to those of a company limited by shares.

Articles must be registered and must state the number of members with which the company proposes to be registered (a). The Memorandum and Articles must be as nearly as possible in the Forms of Table C or D in Sched. I of the Companies Act (b).

If the company is wound up, no contribution can be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company (c).

Past members are liable to be put on the "B" list (d).

If the company has a capital divided into shares, the amount of the capital and the number of shares must be stated in the Memorandum (e).

This provision was first made by the Companies Act, 1900. Consequently in case of a company registered after the Act of 1900, the capital cannot be altered without a change of the Memorandum (as to which see pp. 32, 33, *ante*), but a company registered before the Act may be able to change its capital by merely changing the Articles.

If there is no capital, persons dealing with the company have very little security, as there is no liability on the members until the company is wound up, and by that time most of the members may have retired.

If there is no capital divided into shares, no person who is not a member can participate in the profits of

(a) Companies Act, ss. 6 and 7.

(b) *Ibid.*, s. 11.

(c) *Ibid.*, s. 212 (1) (e).

(d) *Re Premier Underwriting Association, Ltd.* (No. 1), [1913] 2 Ch. 29.

(e) Companies Act, s. 2 (4).

the company, if it was registered after the 1st January, 1901 (*f*).

If there is a share capital, it may be reduced in the same way as in the case of a company limited by shares (*g*).

On an allotment of shares the provisions of s. 52^c of the Companies Act, as to a return of allotments and delivery of contracts to the Registrar, must now be complied with.

If there is no share capital, sect. 132 enables persons holding not less than one-tenth of the voting rights to requisition a general meeting.

The company must keep a register of members (*h*) and of mortgages (*i*) and must send to the Registrar copies of special or extraordinary resolutions (*k*) and must keep a register of directors (*l*); but a company registered without the word "limited" need not send lists of members to the Registrar, and need not make annual returns or returns of allotments if it has no capital divided into shares (*m*).

The stamp duty on registration is dependent on the number of members, and the number must be stated in the Articles. If the number is not more than 20 the stamp is £2, if not more than 100, £5, and if unlimited, £20 (*n*).

SECTION 2

UNLIMITED COMPANIES

The number of unlimited companies formed is naturally very much less than the number of any other form of company, since an unlimited company loses the great advantage of a limitation of the liability of members.

(*f*) Companies Act, s. 21 (1). (*g*) *Ibid.*, s. 66 (1).

(*h*) *Ibid.*, s. 110.

(*i*) *Ibid.*, s. 95.

(*k*) *Ibid.*, s. 143.

(*l*) *Ibid.*, s. 200.

(*m*) *Ibid.*, ss. 19 (3), 124, 125.

(*n*) Companies Act, s. 425, Sched. XII.

Every member of an unlimited company is liable in full, as in the case of a partnership, for all the debts of the company contracted while he is a member.

There are, however, some slight advantages which induce people to form these companies where the liabilities will not be heavy, or where, as in case of mutual insurance, the liability can be limited by the policies themselves (*o*).

An unlimited company need not have a share capital; but it must have Articles (*p*). The Articles must state the number of members with which the company proposes to be registered and the amount of the share capital, if any (*q*).

An unlimited company is subject to the provisions of s. 53 as to underwriting commissions, and it cannot lend money on the security of its shares (s. 54); but it can purchase its own shares (*r*).

It can¹ also reduce its capital (if it has a share capital) or pay back share capital to the members (*r*), and s. 66 as to reduction of capital by leave of the Court does not apply.

The company must make annual returns; under s. 124 if it has a share capital, and under s. 125 if it has none.

No *ad valorem* stamp duty is payable on the capital under s. 112 of the Stamp Act, 1891, but the fees set out in Schedule XII of the Companies Act, 1948, are payable on the formation of the company.

(*o*) Companies Act, s. 212 (1) (f).

(*p*) *Ibid.*, ss. 6 and 11, and see Sched. I., Table E.

(*q*) *Ibid.*, s. 7.

(*r*) *Re Borough Commercial and Building Society*, [1893] 2 Ch. 242.

This freedom from stamp duty is one of the reasons for forming an unlimited company where a person desires to obtain the advantages of forming a company to manage investments (s) or land (t).

SECTION 3

FOREIGN COMPANIES

A company incorporated outside Great Britain, which has a place of business in the United Kingdom (now known as "oversea companies"), must deliver to the registrar—

- (a) a certified copy of its Charter or Memorandum and Articles ;
- (b) a list of its directors with particulars as to the directors and secretary ;
- (c) the names and addresses of one or more persons resident in the United Kingdom authorised to accept service of process and notices (u).
- (d) an annual statement in the form of a balance sheet with the particulars required in the case of a company registered in this country (v).

It must state the country in which it is incorporated in every prospectus inviting subscriptions for shares or debentures and must exhibit in every place where it carries on business, the name of the company and the country where it is incorporated. It must have its name and the country of its incorporation in all official publications.

If the liability of members is limited, notice of that

(s) See Income Tax Act, 1918, s. 33.

(t) See *Fry v. Salisbury House Estate, Ltd.*, [1930] A. C. 432.

(u) Companies Act, ss. 403, 407.

(v) *Ibid.*, s. 410.

fact must be stated in every prospectus, letter, paper and advertisement and must be affixed to every place where it carries on business (*w*).

A foreign company must also register charges on property in England (*x*).

A prospectus of a foreign company is subject to the same rules as to delivering the prospectus for registration and as to the contents of the prospectus as apply to companies registered in England, with some modifications (*y*).

Companies registered outside the United Kingdom which have established a place of business within the United Kingdom can now hold land in England (*z*).

(*w*) Companies Act, s. 411.

(*x*) *Ibid.*, s. 106.

(*z*) *Ibid.*, s. 408.

(*y*) *Ibid* s. 417.

CHAPTER XX

WINDING UP BY THE COURT

If the members wish the company to come to an end, or if it becomes insolvent, or if for any other reason it becomes desirable that the company should cease to exist, it is wound up.

A company may be wound up in three ways :

- (1) Compulsory winding up by the court ;
- (2) Voluntary winding up ;
- (3) Winding up under the supervision of the court.

Whichever way is selected, a liquidator or liquidators are appointed to administer the property of the company, and they must apply the assets of the company, first in the payment of creditors in their proper order, and then in distributing the residue among the shareholders according to their rights.

A company cannot be made bankrupt.

SECTION I

When a company may be wound up by the court.

A company may be wound up by the court when (a)—

- (1) the company has passed a special resolution (b) to wind up ; or,

(a) Companies Act, s. 222.

(b) See p. 230.

- (2) default is made in delivering the statutory report to the Registrar or holding the statutory meeting (c) ; or
- (3) the company does not commence business within a year from its incorporation or suspends business for a year ; or,
- (4) the number of the members falls below seven (or in case of a private company below two) ; or
- (5) the company is unable to pay its debts ; or
- (6) the court is of opinion that it is just and equitable that it should be wound up.

As to (1).—A company may be wound up for any cause whatever if a sufficient number of members pass a special resolution that it shall be wound up.

As to (3).—The power of the court to wind up a company which has not carried on business for a year is discretionary, and will not be exercised unless there are indications that the company has no intention of continuing its business.

Re Capital Fire Insurance (1882), 21 Ch. D. 209

A fire insurance company had commenced a considerable business in France within the year, and intended to commence in England so soon as sufficient capital should be subscribed. An order to wind up was refused.

A company will not be wound up because it has ceased to carry on one of several businesses, unless that business is the main object of the company.

Re Amalgamated Syndicate, [1897] 2 Ch. 600

For facts, see. p. 28

A company which has amalgamated with another company, cannot be wound up on the ground that it

(c) See page 220, *ante*.

has ceased to carry on business as a separate company (*d*). The Registrar may strike the name of a defunct company off the register (*e*).

As to (4).—A company is not often wound up by the court on the ground that the members are less than seven, because the court will not usually make an order to wind up where there are very few members, but will leave the company to wind up voluntarily.

As to (5).—A company is deemed to be unable to pay its debts—

- (1) if a creditor to whom the company owes £50 or more has served on the company a demand for payment, and the debt has not been paid within three weeks ;
- (2) if an execution on a judgment remains unsatisfied ; or
- (3) if it is proved to the satisfaction of the court that the company cannot pay its debts (*f*).

The court may be satisfied by any evidence that it deems to be sufficient.

Re Globe Steel Co. (1875), L. R. 20 Eq. 337

The company accepted a bill of exchange in part payment for goods bought. No demand had been made or execution levied. The bill was dishonoured :—**Held**, this was sufficient proof of insolvency.

A company may be wound up, even when its assets are valuable, if they are locked up in investments and the company is being carried on at a loss.

(*d*) *National Finance Co.* (1866), W. N. 243 ; 14 L. T. 749
For the facts of this case see L. R. 3 Ch. 791.

(*e*) Companies Act, s. 353.

(*f*) *Ibid.*, s. 223.

Re Factage Parisien, explained (1867), L. R. 2
Ch. App., at pp. 746, 747

The company was carrying on its business at a loss, and was paying its debts by making new calls on the members :—**Held**, the company may be wound up. “ If they are carrying on business at a manifest loss, and it is **totally impossible to make any profit**, it can scarcely be said that this court will consider it just and equitable that the company should be allowed to continue when people who have embarked property to a considerable amount in it do not wish it to go on. . . . It is quite distinct from saying that it is an insolvent company, or that it cannot pay its debts, because the persons managing it will take care to have all the debts paid by making calls to meet them.”

This will only be done on clear proof that the company cannot possibly make a profit.

If the company might ultimately make a profit, *e.g.* by a change of management, a winding up order will not be made (*g*).

As to (*6*).—Where there is a petition to the court to wind up a company on the ground that it is “ just and equitable,” the court is not confined to cases similar to those mentioned in sub-ss. (1) to (4) (*h*). The court will not, however, make the order unless there is some special reason for doing so. Thus, general charges of fraud are not usually sufficient (*i*).

Re Medical Battery Co., [1894] 1 Ch. 444

Serious charges were made against the manager of defrauding the public. The company went into voluntary liquidation, but some creditors wanted to have it wound up by the court :—**Held**, fraud towards the outside world is no ground for compulsory winding up.

(*g*) *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737. In the *Factage Parisien* case (above) the Lord Chancellor, on appeal, discharged the order after a general meeting had voted against a winding up. *Ibid.*, at p. 749.

(*h*) *Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426; *Loch v. John Blackwood, Ltd.*, [1924] A. C. 783.

(*i*) Fraud, if alleged, must be specifically proved, and it is not sufficient that it should appear in the statutory affidavit alone (*Re London and Hull Soap Works, Ltd.*, [1907] W. N. 254).

But where the whole object of the company was fraudulent, the company has been wound up.

Re Brinsmead (T. E.) & Sons, [1897] 1 Ch. 45, 406

T. E. Brinsmead and two of his sons had been in the employ of the old firm of John Brinsmead & Sons. They started a company, and agreed to sell to this company the business and name of T. E. Brinsmead & Sons. They were restrained by an injunction from using the name Brinsmead on the ground of fraud. A petition for compulsory winding up was then presented :—**Held**, the company was initiated to carry out a fraud, and was hopelessly embarrassed by a lot of actions for fraud ; therefore it was just and equitable that it should be wound up.

A company may be wound up on the ground that it is just and equitable for the purpose of defeating a reconstruction scheme which is prejudicial to the shareholders (*k*), or in case of a deadlock (*l*), or, in the case of a private company, for reasons which would justify a dissolution of partnership (*m*). *e.g.* where one member excludes the other member who holds half the shares (*n*).

In the case of a petition on this ground by a contributor, if the court considers that the petitioner has some other remedy, but that otherwise it would be just and equitable to order a winding up, the court is bound to make the order, unless it considers the petitioner is acting unreasonably in asking for a winding up instead of pursuing his other remedy (*o*).

(*k*) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(*l*) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426, and *Re American Pioneer Leather Co.* [1918] 1 Ch. 556.

(*m*) *Yenidje Tobacco Co., Ltd.* (*supra*) ; *Loch v. John Blackwood, Ltd.*, [1924] A. C. 783.

(*n*) *Re Davis and Collett, Ltd.*, [1935] Ch. 693 ; but see *Re Cuthbert Cooper & Sons, Ltd.*, [1937] W. N. 148, where this principle was not applied.

(*o*) Companies Act, s. 225 (2).

SECTION 2

Who may Petition

Winding up by the court is commenced by a petition to the court. Either a contributory or a creditor may petition or both together ; for the order is made for the benefit of all (*p*), and the court may in either case have regard to the wishes of the creditors and contributories (*q*).

1. **Petition by contributory.**—A contributory cannot petition unless he has held his shares for at least six months during the eighteen months preceding the petition, except where—

- (1) he is an original allottee, or
- (2) the shares have devolved on him through the death of a former holder, or
- (3) the number of the members has become less than seven (or two in case of a private company).

A fully paid shareholder can petition ; so can a member whose calls are in arrear ; so can a contributory on the B list (*r*). Any provision in the Articles which deprives members of their right to petition is void See p. 111, *ante*.

The court is not bound to make the order on a contributory's petition, and may always have regard to the wishes of the creditors and other contributories (*s*).

The court may direct meetings of creditors or contributories to be held for the purpose of ascertaining their wishes, and must have regard to the value of the debt of each creditor and the voting rights of the contributories under the Articles (*s*).

(*p*) Companies Act, s. 232.

(*q*) *Ibid.*, s. 346.

(*r*) Buckley, 11th edit., p. 371.

(*s*) Companies Act, s. 346 *Re Home Remedies, Ltd.* [1943] Ch. 1 ; [1942] 2 All E. R. 552.

The court will not order a winding up, if the interest of the petitioning contributory is very small, and the majority of the members do not wish the order to be made ; or if the number of shareholders is very small :

Re Professional, etc., Building Society (1871), L. R. 6 Ch. App. 856

Four members of a building society wished for compulsory winding up ; the rest did not. The order was refused.

or if presented in bad faith.

Re Metropolitan Saloon Omnibus Co. (1859), 28 L. J. Ch. 830

Certain creditors had brought a winding-up petition against the company, which was dismissed with costs. They then persuaded a shareholder to present a petition for the purpose of annoying the company :—**Held**, the petition is *mala fide* and bad.

But the court will generally make the order where there is anything which seems to require investigation.

Re Varieties, Ltd., [1893] 2 Ch. 235

The company was formed to build a music hall on land leased to the company by S. S. was to build the hall. S. and his nominees held 3,700 shares. The county council refused to sanction the plans. The holders of 3,900 shares voted for a voluntary winding up and appointed the secretary as liquidator. 847 independent shareholders wanted a winding up by the court to inquire into the actions of S.:—**Held**, the conduct of S. may require investigation ; the company must be wound up by the court.

Before 1907 it was held that a contributory must allege and prove that there are assets.

Now by sect. 225 (1) the Court must not refuse to make an order on the ground that there are no assets ; but this section does not entitle a shareholder to have the company wound up, unless there is a case for

investigation or other good reason for a compulsory order (*l*).

If the company does not deliver a report to the Registrar before the statutory meeting, or does not hold the meeting, a contributory may petition to wind up the company (*a*).

The fact that a voluntary winding up has commenced does not prevent a contributory or a creditor from obtaining a winding-up order; but in the case of a petition by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by the voluntary winding up (*b*) (see further p. 286, *post*).

2. Petition by creditor.

The court is bound (as against the company) to **make the order to wind up** if the creditor can prove that he has an undisputed debt and any of the things have happened which are enumerated in s. 222 (see pp. 262, 263). And the burden of proving that there are assets does not lie on the creditor (*c*).

A creditor who cannot get paid is said to have a right *ex debito justitiae* to a winding up order; but the court may refuse to order a winding up, if the majority of creditors oppose it :

Re Ilfracombe Building Society, [1901] 1 Ch. 103

All the creditors except C. agreed to accept 12s. 6d. in the pound. C. afterwards petitioned to wind up :—**Held**, the petition must be dismissed.

or if the order will do no good.

(*f*) *Re Kaslo-Slocan Mining and Financial Corporation, Ltd.* [1910] W. N. 13; *Re Haycraft Gold Reduction and Mining Co.* [1900] 2 Ch. 230.

(*a*) Companies Act, ss. 222 and 224.

(*b*) *Ibid.*, s. 310.

(*c*) *Re Krasnapolsky Co.*, [1892] 3 Ch. 174.

Before the Act of 1907 the court would refuse to make the order if there was nothing to wind up or no assets for the ordinary creditors (see *Re Greenwood & Co.*, [1900] 2 Q. B. 306).

But now an order to wind up a company is not to be refused "on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets" (d).

And even before the Act of 1907 the court has made the order in special circumstances, though there was probably nothing for the unsecured creditors.

Re Alfred Melson & Co., [1906] 1 Ch. 841

The debenture-holders were carrying on business in the name of the company, but no receiver had been appointed. There was no proof that there would be anything for the other creditors.—Held, even if there is nothing for the ordinary creditors it may be "just and equitable" that the company should be wound up—for they are obtaining credit from persons whose rights may be swallowed up at any moment by the debenture-holders (e).

The court is not bound to make the order at once, but may direct the petition to stand over for a time.

Re Brighton Hotel Co. (1868), L. R. 6 Eq. 339

The shareholders were getting up a subscription to pay off the immediate debts and were going to appoint new directors and cut down the expenses:—Held, the petition must stand over for four weeks to allow this to be done.

A creditor whose debt is disputed on some substantial ground cannot generally get a winding-up order. The

(d) Companies Act, s. 225. *Re Clandown Colliery Co.*, [1921] 1 Ch. 369.

(e) See as to the position of creditors in this case, *Re London Pressed Hinge Co., Ltd.*, [1905] 1 Ch. 576, and for cases in which a similar order was made, *Re Chic, Ltd.*, [1905] 2 Ch. 345; and *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327.

court may either order the petition to stand over until the validity of the debt can be determined or may dismiss the petition, and may even restrain the creditor by injunction from bringing a threatened petition.

Niger Merchants' Co. v. Capper (1877), 18 Ch. D. 557 n.

C. claimed £500 from the company for services. The company said they owed C. £260 only and had a set-off for this. C. then threatened to wind up the company if he was not paid. The company was solvent :—**Held**, injunction granted to restrain C. from bringing the petition.

An injunction can also be obtained to prevent the advertising of a winding-up petition (*Re A Company* [1894] 2 Ch. 349).

But the court will sometimes decide the validity of the debt forthwith.

Re Imperial Silver Quarries Co. (1868), 16 W. R. 1220

J. sold a silver mine to the company for shares and debentures. The principal secured by the debentures was repayable out of profits. J. sold six debentures to A. One and a half years' interest became due, but there had been no profits. A. petitioned to wind up the company. The company disputed A.'s claim on the ground that the interest was payable out of profits only :—**Held**, this was not a very substantial dispute, and depended only on the construction of the debentures; the court decided that A.'s claim was good and made the order to wind up.

A debenture-holder may petition if the principal sum is payable to the debenture-holders direct, but **not** if it is payable to the trustees of a debenture trust deed (*Re Uruguay Central Rail. Co.* (1879), 11 Ch. D. 372) (f); and the order has been refused where the debenture-holders had power to appoint a receiver, and had not done so (g).

(f) *Re Dunderland Co., Ltd.*, [1909] 1 Ch. 446 (Debenture Stock holder).

(g) *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181,

The assignee of a debt can petition, and so can the assignee of part of a debt (*h*), but not a creditor of a third party who has, by means of a garnishee order, attached a debt due from the company to the third party.

A creditor who has commenced a petition cannot sell his debt and the right to carry on the petition (*Re Paris Skating Rink* (1877), 5 Ch. D. 959).

A creditor whose claim is contingent or prospective can petition on giving security for costs (*i*), and on showing that a *prima facie* case for winding up has arisen.

British Equitable Bond, etc., Ltd., [1910] 1 Ch. 574

The holder of an insurance policy which had not matured presented a petition :—**Held**, he can petition.

A creditor whose claim is unliquidated cannot petition ; he must first get a judgment fixing the amount of the debt. The creditor's debt need not amount to £50 ; but the court will not usually make a winding-up order if the petitioning creditor's debt is small. The £50 mentioned in s. 223 (see p. 264) is usually regarded as suggesting the minimum amount, and, if the total amount of the debts due to the petitioning (*k*), creditor and those supporting the petition is less than £50, the court will not make the order unless there are special circumstances (*l*).

Where the company refused to pay the debt because it was thought to be too small to support a winding-up petition, the court made a compulsory order (*Re World Industrial Bank, Ltd.*, [1909] W. N. 148).

The Official Receiver can petition for a compulsory winding up after a voluntary winding up has commenced (*m*).

(*h*) *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349.

(*i*) Companies Act, s. 224 (1) (c).

(*k*) *Re Leyton Cycle Co.*, [1901] W. N. 225.

(*l*) *Re Industrial Assurance Association*, [1910] W. N. 254.

(*m*) Companies Act, s. 224 (2).

In the case, now very rare, where a husband is a contributory in respect of his wife's shares he can present a petition (*n*).

The winding-up order operates for the benefit of all creditors and contributories (*o*).

Anⁿ action will lie for maliciously presenting a winding-up petition.

Quartz Hill Co. v. Eyre (1883), 11 Q. B. D. 674

Held, no special damage need be proved, "for the presentation of the petition is from its very nature calculated to injure the credit of the company."

SECTION 3

What companies can be wound up by the court.

The High Court has jurisdiction to wind up any company registered in England, whether it was registered under the Act of 1948 or any of the Companies Acts now repealed (*p*).

The court may wind up a **foreign company** if it is or has been carrying on business in Great Britain (*q*).

Re Russian Bank for Foreign Trade, [1933] Ch. 745

The Bank was established in Russia in 1871 and carried on business for many years in England. In 1917 the Bank was dissolved by decree of the Russian revolutionary government. The London branch of the Bank continued to carry on business, and a petition was presented by a person claiming to be a creditor for £23,000 :—**Held**, the Bank may be wound up though (1) it had ceased to exist in Russia, and (2) the debt was disputed (*r*).

Where the company has ceased to exist, documents may be served upon it at its last known place of

(*n*) S. 224 (3).

(*o*) S. 232.

(*p*) SS. 218, 377, 378.

(*q*) S. 399.

(*r*) And see *Re Russian and English Bank*, [1932] 1 Ch. 663,

business (s), and an order can be made to wind it up, and thereupon the company can bring actions, acting through its liquidator. *Russian and English Bank v. Baring Brothers.*, [1936] A. C. 405.

Unregistered companies can be wound up.

e.g. an unregistered Friendly Society (t).

An illegal society cannot be wound up by the court (u).

SECTION 4

Procedure on winding up by the court

Proceedings to enforce winding up are commenced by petition, which is supported by an affidavit of the petitioner (a).

The petition can in every case be presented in the High Court (b), or, if the capital of the company paid up or credited as paid up is not more than £10,000, the petition may, if preferred, be presented in the county court (b). Proceedings in the High Court can be transferred to the county court (c).

The court may either—

- (1) dismiss the petition with or without costs; or
- (2) order it to stand over (see p. 270); or
- (3) make an order for winding up under supervision of the court (see p. 290); or
- (4) make a compulsory order for winding up the company; or
- (5) make any other order that may be just.

(s) *Re Tea Trading Co.*, [1933] Ch. 647.

(t) S. 338. *Re Victoria Society*, [1913] 1 Ch. 167.

(u) *Re Padstow Assurance Association* (1882), 20 Ch. D. 137.

(a) The affidavit of some other person will be accepted if there is reason for so doing (*Re African Farms, Ltd.*, [1906] 1 Ch. 640).

(b) Companies Act, s. 218.

(c) Even if the paid-up capital exceeds £10,000, *Re Vernon Heaton Co.*, [1936] Ch. 289.

If the order is made to wind up compulsorily, the court appoints a liquidator and may settle the list of contributories, make calls, etc. (see p. 321, *post*), but these powers are now usually exercised by the liquidator. If a contributory is dead, the court may order that his estate be administered by the court.

The winding-up dates from the presentation of the petition (*d*) except—

- (1) where there has been a resolution to wind up voluntarily, when it dates from the resolution (*d*) ;
- (2) for the purpose of preferential payments (see p. 299 *et seq.*) where there has been no voluntary winding up, when it dates from the appointment of a provisional liquidator, or, if no liquidator has been appointed, from the date of the order (*e*).

Persons entitled to be heard on the hearing of the petition are (1) the company ; (2) any creditor ; (3) any contributory.

The liquidator may apply to the court to determine any question arising in the winding up (*f*).

Questions arising in the winding up can, with certain exceptions, be heard by the registrar (*g*). An appeal from his decision lies to the judge (*Re Pretoria Pietersburg Railway Co.*, [1904] 2 Ch. 170). Questions between the company and persons who are not members of the company, *e.g.* vendors, cannot be tried in this way (*h*).

The petition must be presented at the registrar's office and must be advertised in the *London Gazette* and one other London or local paper, or as the registrar shall direct (*i*).

(*d*) Companies Act, s. 229. (*e*) *Ibid.*, s. 319 (8) (*d*).

(*f*) *Ibid.*, s. 246 (3).

(*g*) Winding-up Rules, 1929 r. 5.

(*h*) *Re Centrifugal Butter Co., Ltd.*, [1913] 1 Ch. 188.

(*i*) Winding-up Rules (1929), r. 27.

A slight mistake in the form of the advertisement will not invalidate the proceedings (*k*).

A copy of the winding-up order, when made, must be forwarded to the registrar (*l*).

When a winding-up order has been made, the secretary and one of the directors must make out and submit to the Official Receiver within fourteen days a statement verified by affidavit showing the assets, debts and liabilities of the company with a list of creditors and their securities (*m*). The statement is open to the inspection of creditors and contributories on payment of a fee. A person making this statement is entitled to his costs out of the assets, provided he obtains the sanction of the Official Receiver before incurring them (*n*).

The Official Receiver, after receiving this statement, reports to the court as to the assets and liabilities of the company, the causes of failure and whether inquiry is desirable. He may also point out any suspicious or fraudulent circumstances with a view to a public examination (*o*).

Costs.—If the petition is successful, the petitioner's costs are a first charge on the assets of the company available for the ordinary creditors; *e.g.* 'not on property over which debenture-holders have a claim.

A person who lodges a second petition, when one is already presented, may have to pay the costs:

Two companies cannot be wound up by the same order.

The court may stay the proceedings in the winding up, if they ought to be stayed for any reason (*p*).

Appeal lies to the court of appeal (*q*).

(*k*) *Re Saul Moss & Sons, Ltd.*, [1906] W. N. 142.

(*l*) Companies Act, s. 230.

(*m*) *Ibid.*, s. 235 (penalty £10 per day).

(*n*) W. U. Rule 54 of 1929.

(*o*) Companies Act, s. 236.

(*p*) Companies Act, s. 256.

(*q*) Security for costs must be given if the company appeals, *Re Consolidated South Rand, Ltd.*, [1909] 1 Ch. 491.

When the affairs of the company are completely wound up, the **court makes an order that the company be dissolved**. The liquidator must report this order to the registrar, who makes an entry in the register that the company is dissolved (*r*). The company then ceases to exist, and any property of the company which may happen to remain (including freehold or leasehold land) becomes vested in the Crown as *bona vacantia*, but the crown's title may be disclaimed by a notice signed by the Treasury solicitor (*s*).

This does not include property held in trust by the company (*t*). A new trustee of such property may be appointed and a vesting order can be made by the Court (*u*).

When a company has been dissolved, the court may within two years, on the application of the liquidator or any person interested, make an order declaring the dissolution to have been void (*v*).

Proceedings can then be taken as if the company had not been dissolved. But proceedings taken against the company after it was dissolved are invalid (*w*). The person who obtains the order must deliver an office copy of the order to the registrar within seven days (*v*).

Spottiswoode, Dixon and Hunting, Ltd., [1912] 1 Ch. 410

The S. company held shares in the A. company which were not fully paid.

(*r*) Companies Act, s. 274.

(*s*) *Ibid.*, ss. 354, 355. Formerly freeholds reverted to the grantor and leaseholds came to an end. *Hastings Corporation v. Letton*, [1908] 1 K. B. 378, at p. 384. *Co. Lit.* 13 B. Now by s. 181 of the Law of Property Act, 1925, the court can create a new legal estate and vest it in the person entitled in equity. *Re Crichton (C. & H.) (1921), Ltd.*, [1932], W. N. 208.

(*t*) Companies Act, s. 354.

(*u*) Trustee Act, 1925, s. 51 (1) (ii), and see *Re No. 9, Bomore Road*, [1906] 1 Ch. 359. Law of Property Act, 1925, s. 181. *Re Strathblaine Estates, Ltd.*, [1948], Ch. 228.

(*v*) Companies Act, s. 352.

(*w*) *Morris v. Harris*, [1927] A. C. 252.

In 1909 the S. company was wound up for the purposes of reconstruction and a new company took over its assets and liabilities. The A. company had no notice of the liquidation.

In 1911 the A. company made a call on the shares, which the new company refused to pay:—**Held**, the A. company was a "person interested," and the dissolution of the S. company was declared void.

An order may be made after two years, if the application is made within two years (x).

Property which has vested in the Crown as *bona vacantia* (see p. 277, *ante*), reverts or remains vested in the company (y).

A winding-up petition can only be withdrawn subject to the power of the court to substitute another creditor or contributory as petitioner (z).

For the effect of a winding-up order see Chapter XXIII.

(x) *Re Scad, Ltd.*, [1941] Ch. 386; [1941] 2 All E. R. 466.

(y) *Re Dixon (C. W.) Ltd.*, [1947] Ch. 251; [1947] 1 All E. R. 279.

(z) Winding-up Rules (1929), r. 36.

CHAPTER XXI

VOLUNTARY WINDING UP

THE object of a voluntary winding up is that the company and its creditors shall be left to settle their affairs without coming to the court, but to provide them with every facility for applying to the court if necessary.

SECTION 1

How and when a Company may be Wound up voluntarily

There are three possible ways of winding up voluntarily. Each way requires a different form of resolution.

A company may be wound up voluntarily when (a)—

- (1) the period fixed for the duration of the company has come to an end, or an event upon which the company is to be wound up has happened **and** the company has in general meeting passed an **ordinary resolution** to wind up ;
or
- (2) the company has (for any cause whatever) passed a **special resolution** (b) to wind up voluntarily ; or

(a) Companies Act, s. 278.

(b) See p. 230.

- (3) the company has passed an **extraordinary resolution** that it cannot by reason of its liabilities carry on its business, and that it is expedient that the company be wound up.

As to (1).—A company can only be wound up by ordinary resolution if it is bound to cease under the terms of its regulations.

As to (2).—The company may be wound up by special resolution for any reason, even if it is flourishing.

As to (3).—Where a company is to be wound up by extraordinary resolution, the notices calling the meeting must state that it is proposed to wind up the company because its liabilities prevent it from carrying on its business.

Re Silkstone Fall Colliery Co. (1875), 1 Ch. D. 38

Notices were sent out of a meeting "to pass a resolution for the voluntary winding up of the company, if it should be determined to do so." An extraordinary resolution was passed for winding up :—**Held**, the notices were bad, as they did not specify that it was to be wound up for this reason.

A voluntary winding up dates from the passing of the resolution which authorises it (c).

Effect of voluntary winding up.

- (1) **The company ceases to carry on its business** except for the purpose of beneficial winding up (d).
- (2) **Transfers of shares are void** except with the sanction of the liquidator (e).

(c) Companies Act, s. 280. (d) *Ibid.*, s. 281.

(e) *Ibid.*, s. 282.

Taylor's Case, [1897] 1 Ch. 298

After winding up T. transferred his shares to P., and P. transferred them to R. with the consent of the liquidator :—**Held**, the transfers were good. R. must be put on the A. list and T. and P. on the B. list of contributories.

A transfer of shares only and not debentures is prohibited.

(3) **Alterations in the status of members are void (f).**

Castello's Case (1869), L. R. 8 Eq. 504

Special resolution to wind up passed August 7th. C. transferred his shares to an infant Q. on August 14th. Resolution confirmed August 23rd. The infant reached full age in October. The infant then confirmed the transfer :—**Held**, the transfer was void. Q. was an infant at the date of the winding up, and therefore cannot change his status so as to become capable of ratifying after the winding up.

(4) **The corporate state and power of the company continue.**

SECTION 2**Proceedings on Voluntary Winding up**

There are now two kinds of voluntary winding up—

1. A member's voluntary winding up.

In the case of a solvent company a majority of the directors may make and deliver to the Registrar a statutory declaration, called a "Declaration of Solvency," to the effect that in their opinion the company will be able to pay its debts in full within twelve months (g).

This declaration has no effect unless it is made within five weeks preceding the resolution to wind up and must contain a statement of the company's assets and liabilities. Any director making a declaration without having

(f) Companies Act, s. 282.

(g) Companies Act, s. 283.

reasonable grounds for the opinion that the company will be able to pay its debts in full within the time specified in the declaration, is made liable to a fine or imprisonment or both (*h*).

If in a member's voluntary winding up the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated, he must summon a meeting of creditors and lay before the meeting a statement of the assets and liabilities of the company (*i*), and thereupon the provisions set out in p. 283, *post*, will apply (*j*).

When a declaration of solvency has been effectively made, the company in general meeting appoints a liquidator and fixes his remuneration. On the appointment, all the powers of the directors cease, except so far as the company in general meeting or the liquidator sanction their continuance (*k*).

If a vacancy occurs, the company in general meeting may fill up the vacancy. Any contributory can call the meeting (*l*).

If the winding up continues for more than one year, the liquidator must summon a general meeting of the company at the end of the first year and each successive year, and lay before the meeting an account (*m*).

When the company's affairs are fully wound up, the liquidator must make up a final account and call a general meeting of the company (called the "final meeting"), which must be advertised in the *London Gazette*. Within a week after the final meeting the

(*h*) Companies Act, s. 283.

(*i*) *Ibid.*, s. 291. (*j*) *Ibid.*, 291.

(*k*) Companies Act, s. 285. The liquidator must publish in the Gazette and deliver to the registrar, notice of his appointment within 14 days. Companies Act, s. 305.

(*l*) Companies Act, s. 286. (*m*) *Ibid.*, s. 289.

liquidator must send the registrar a copy of the accounts, and make a return of the holding of the meeting. The registrar registers the accounts and returns, and at the end of three months from the date of registration the company is dissolved (n).

2. **A** creditors' voluntary winding up.

In any case where the declaration of solvency has not been made, the company must call a meeting of the creditors for the same day as, or on the next day after, the meeting at which the resolution for voluntary winding up is to be proposed. The meeting must be advertised in the *London Gazette*, and the directors must lay before the meeting of the creditors a statement of the position of the company with a list of its creditors. There are penalties for default (o).

The creditors and the company may at their meetings each nominate a liquidator ; but the nomination of the creditors will prevail, subject to an application to the court (p).

The creditors, at their meeting, may appoint a committee of inspection, and the company may appoint not more than five person to be members of the committee, subject to the power of the creditors to disapprove of any persons so appointed (a). -

The committee of inspection or the creditors may fix the remuneration of the liquidator. On the appointment of the liquidator all the powers of the directors cease, except so far as the committee of inspection or the creditors sanction their continuance (b).

In case of a vacancy, the creditors may appoint another liquidator (c).

(n) Companies Act, s. 290.

(o) *Ibid.*, s. 293.

(a) *Ibid.*, s. 295.

(c) *Ibid.*, s. 297.

(p) *Ibid.*, s. 294.

(b) *Ibid.*, s. 296.

If the winding up continues more than a year, the liquidator must summon a general meeting of the company and a meeting of the creditors at the end of the first year and of each successive year, and lay an account before the meetings (*d*).

When the affairs of the company are fully wound up, the liquidator must make up an account and call final meetings of the company and the creditors, which must be advertised in the *London Gazette*, and lay the account before the meetings. Within a week after the meetings, the liquidator must send to the registrar a copy of the account and a return, which will be registered, and on the expiration of three months from the registration the company is dissolved (*e*).

In either case—

(1) Notice of the special or extraordinary resolution to wind up must be advertised in the *London Gazette* (*f*) within fourteen days.

(2) (*g*) The property of the company is applied first in satisfaction of the liabilities of the company *pari passu*; and subject thereto is distributed among the members.

(3) The liquidator may, without leave of the court, exercise all the powers of a liquidator appointed by the court. (See p. 317, *post.*) (*h*)

(4) The liquidator settles the list of contributories' and his list is *prima facie* evidence of their liability (*h*).

(5) The liquidator **must pay the debts of the company** and settle the rights of the contributories *inter se*.

(*d*) Companies Act, s. 299.

(*e*) *Ibid.*, s. 300.

(*f*) *Ibid.*, s. 279.

(*g*) *Ibid.*, s. 302.

(*h*) *Ibid.*, s. 303.

Liability of Liquidator

If he fails to do so, the creditor or contributory who is not paid can apply to the court under section 252 of the Companies Act ; but he cannot claim payment from the liquidator personally either under this section (*k*), or by an action commenced by writ (*l*). If, however, the liquidator has destroyed the remedy of the creditor or contributory by allowing the company to be dissolved or by parting with all its assets, the liquidator becomes personally liable.

Pulsford v. Devenish, [1903] 2 Ch. 625

The liquidator **negligently** omitted to pay one of the creditors of the company. The company was wound up and ceased to exist :—**Held**, the liquidator was still under his statutory liability to pay the debts, and must pay the plaintiff out of his own pocket (*m*).

The liquidator does not become personally liable on contracts made by him as liquidator when carrying on the business of the company for the purposes of winding it up (*n*).

The liquidator or any creditor or contributory may apply to the court (*a*) as in a winding up by the court, and the jurisdiction of the court is generally much the same as on a winding up by the court.

In every case of doubt the liquidator should apply to the court.

(*k*) *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947.

(*l*) *Knowles v. Scott*, [1891] 1 Ch. 717.

(*m*) See also *James Smith & Sons (Norwood), Ltd. v. Goodman*, [1936] Ch. 216, where the company was a lessee under a lease and the company assigned the lease. The liquidator distributed the assets without providing for the contingent liability of the company for the rent, and the liquidator was held liable in damages.

(*n*) *Stead, Hazel & Co. v. Cooper*, [1933] 1 K. B. 840.

(*a*) Companies Act, s. 307.

Where large sums are involved, he should always apply to the court for directions, unless the position is perfectly clear; since liquidators have been held to be liable for negligence where they have *bona fide* paid large sums of money to claimants who were held not to be entitled to them (*b*).

If after the "final meeting" (see p. 284, *ante*) it becomes desirable to keep the company alive for more than the three months, this may be done by an order deferring the date of dissolution (*c*), or the dissolution may be declared to have been void (*d*).

The costs of a voluntary winding up are payable first out of the assets (*e*).

The creditors have a right to a winding up by the court *ex debito justitiae* (see p. 269, *ante*) in spite of a voluntary winding up having commenced (*f*).

The court will not as a rule, upon the petition of a contributory, make an order for compulsory winding up after a voluntary winding up has commenced unless—

- (1) the voluntary winding up is fraudulent; or
- (2) there are circumstances of suspicion; or
- (3) a searching investigation is needed.

But the court has a discretion and has power to make the order whenever the contributory would be prejudiced by a voluntary winding up (*g*).

(*b*) *Re Windsor Steam Coal Co.*, [1929] 1 Ch. 151. *Home and Colonial Insurance Co.*, [1930] 1 Ch. 102.

(*c*) Companies Act, s. 290 (4). An office copy of the order must be delivered for registration within 7 days.

(*d*) Companies Act, s. 352. See p. 277, *ante*.

(*e*) Companies Act, s. 309.

(*f*) *Ibid.*, s. 310. *Re Millward (James) & Co., Ltd.*, [1940] Ch. 333; [1940] 1 All E. R. 347.

(*g*) *Ibid.*, s. 310.

Re National Company for Distribution of Electricity,
[1902] 2 Ch. 34

After voluntary winding up commenced, some fully paid shareholders presented a petition for compulsory winding up, though there were ample assets, on the ground that some of the directors had received presents:—**Held**, a compulsory order may be made on the petition of fully paid shareholders, where there are surplus assets, and even though there is no fraud. But not in this case, as it would not bring anything to the shareholders.

If the court makes an order for compulsory winding up after a voluntary winding up has commenced, the commencement of the winding up dates from the resolution, and the court will, except in case of fraud or mistake, adopt all the previous proceedings (*h*).

Arrangements or compromises by a company with its creditors can be made as follows:—

- A. Under section 306, in the course of voluntary liquidation.

The arrangement is binding:—

- (i) On the company, if sanctioned by an extraordinary resolution;
- (ii) On the creditors, if acceded to by three-quarters in number and value of the creditors.

but subject to appeal to the court (*i*).

- B. Under section 206, whether the company is being wound up or not.

The court may for this purpose call meetings of creditors and members, or classes of creditors and members, and may declare the arrangement binding, if it is confirmed by a **majority in number** representing

(*h*) *Ibid.*, s. 229.

(*i*) Companies Act, s. 306 (2). A composition entered into with a view to preventing a voluntary winding up is not within the section. *Re Contal Radio*, [1932] 2 Ch. 66.

three-fourths in value of the creditors or members present (in person or by proxy) **and voting** at the meeting (*k*).

Where a meeting of creditors or any class of creditors is summoned under this section, a statement must be sent with the notice convening the meeting, explaining the effect of the compromise or arrangement and in particular the manner in which the interests of the directors will be directly or indirectly affected. Where debenture-holders are affected, similar information must be given as respects the trustees of any debenture trust deed.

Any person who is or has been a director must give notice to the directors of such matters relating to himself as may be necessary for the purpose of the disclosures mentioned above (*l*).

Sometimes one class of shareholders (or creditors) is affected more or less than another class. If so, separate meetings of each class affected by the arrangement must be held. The consent of a class which has no interest in the assets may be dispensed with.

Re Tea Corporation, Ltd., [1904] 1 Ch. 12

On the winding up, the assets were not sufficient to leave anything for the ordinary shareholders. An arrangement was made; the preference shareholders and creditors voted for it; but the ordinary shareholders voted against it:—**Held**, as the ordinary shareholders had no interest in the assets, their dissent did not matter.

An arrangement can be made though there is no dispute to compromise (*m*).

The Court will not refuse to sanction a scheme, unless it is satisfied that from a business point of view the members of the class if acting honestly and intelligently

(*k*) Companies Act, s. 206.

(*l*) *Ibid.*, s. 207.

(*m*) *Re Guardian Assurance Co.*, [1917] 1 Ch. 431.

could not reasonably have approved the scheme in their own interests (n). Where a large number of shareholders of one class also hold shares in another class with conflicting interests the court will not pay much attention to the result of the voting, but will consider whether the scheme is fair. The court cannot sanction a scheme which involves *ultra vires* acts by the company (p).

(n) *Re Dorman, Long & Co.*, [1934] Ch. 635.

(o) *Carruth v. Imperial Chemical Industries, Ltd.*, [1937] A. C. 707 (a case of reduction of capital).

(p) *Re Oceanic Steam Navigation Co.*, (1939) Ch. 41; [1938] 3 All E. R. 740.

CHAPTER XXII

WINDING UP UNDER SUPERVISION OF THE COURT

WHEN a resolution has been passed to wind up voluntarily, the court may order that the winding up shall proceed under the supervision of the court, or a creditor may petition that the company be wound up under the supervision of the court (*a*).

The effect is that the liquidator may exercise all his powers without the sanction of the court as in a voluntary winding up, but subject to such restrictions as the court may direct.

The court has a discretion, both as to whether the order shall be made, and as to the amount of restriction that shall be imposed on the liquidator.

Re Watson & Sons, [1891] 2 Ch. 55

Held, the court has power by restrictions imposed on the voluntary liquidator, almost to turn a voluntary liquidation into liquidation by the court, or it may relax the restrictions according to the requirements of each case.

In these respects the court may have regard to the wishes of the creditors and contributories (*b*).

The effect of the order is the same as an order for compulsory winding up, except that the following sections do not apply (*c*).

- (*a*) Companies Act, s. 311. (*b*) *Ibid.*, s. 346.
(*c*) Companies Act, s. 315 (2) and Schedule XI.

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Section 235, which requires a statement of the company's affairs to be submitted to the Official Receiver.

Section 236, which requires the Official Receiver to make a report to the court.

Sections 237, 238, 239, and 242, relating to the appointment of liquidators by the court. (Sub-sect. (5) of sect. 242, making the acts of a liquidator valid in spite of any defect in his appointment, applies to a winding up under supervision.)

Section 240, requiring the liquidator to give information to the Official Receiver.

Section 248, requiring payment of the moneys in the hands of the liquidator into the Bank of England.

Sections 247 and 249, requiring the liquidator to send accounts to the Board of Trade and to keep proper books.

Section 251, as to the release of the liquidators.

Sections 246 and 250, as to the control of the liquidator by the meetings of creditors and the Board of Trade.

Section 252, as to meetings of creditors and contributories.

Sections 253, 255, and 263, as to committee of inspection and special managers.

Section 254, as to the powers of the Board of Trade where there is no committee of inspection.

Section 368, as to the appointment of the Official Receiver to be receiver for debenture-holders.

Section 273, as to making rules for the conduct by the liquidator of the powers of the court.

Section 270, providing for the public examination of promoters, directors, or other officers of the company.

Since the Companies Act, 1900, gave creditors power to apply to the court in a voluntary winding up, the chief reason for ordering a winding up under supervision has gone. But the order is still sometimes made.

Advantages.

- (i) Section 231 applies, and no proceedings can be commenced or continued against the company without leave of the court.
- (ii) Section 256 applies, and the court may make an order staying proceedings in the winding up.

- (iii) Section 314 applies, and the court may appoint an additional liquidator.
- (iv) The order provides that no costs or remuneration shall be paid unless they are taxed or allowed by the registrar.

If a petition is presented for winding up under supervision, the court cannot make a compulsory order on the motion of a creditor (*d*) ; and if an order is made for winding up under supervision, a creditor cannot present a petition for compulsory winding up, but the official receiver may do so (*e*).

Dissolution.

This can only be done by an order of the Court under section 274, as this section is not excluded by section 315.

(*d*) *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563.

(*e*) *Re Jubilee Sites Syndicate*, [1899] 2 Ch. 204.

CHAPTER XXIII

CONSEQUENCES OF WINDING UP

Notice of winding up.—Every invoice, order for goods or business letter on which the name of the company appears must contain a statement that the company is being wound up (*a*).

(1) As to shareholders.

On a winding up the liquidator settles a list of “contributories” (*b*).

Present members are put on the “A” list.

Past members are put on the “B” list.

(As to the method of settling the list, see p. 321.)

Every past or present shareholder becomes a contributory, *i.e.*, is bound to contribute towards payment of the debts and winding-up expenses of the company, unless he can bring himself within the following exceptions.

In the case of a company limited by shares no contribution can be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable.

(As to Guarantee Companies, see p. 256, *ante*.)

(*a*) Companies Act, s. 338. (*b*) *Ibid.*, s. 257.

A **past** member is **not** liable to contribute—

- (1) if he has ceased to be a member for one year or upwards before the commencement of the winding up ; or
- (2) in respect of any debt of the company contracted after he ceased to be a member ; or
- (3) unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them.

Result. A present member is only liable to the extent to which his shares are not fully paid up.

A past member, in addition to this limitation, can only be made to contribute if he has ceased to be a member within the year and the present members fail to meet their liabilities in respect of the debts incurred while he was a member.

There are therefore two limitations on the liability of a B contributory—

- (1) He is only liable to the extent to which the transferee of his shares has failed to pay them up in full.
- (2) He can only be called upon to pay so much of this amount as is necessary to pay so much of the debts incurred while he was a member as remain unpaid after applying all the contributions of the A contributories and all the assets of the company *pari passu* towards payment of all its debts, irrespective of the date when they were incurred (c).

Helbert v. Banner, Re Barned's Bank (1871),

L. R. 5 H. L. 28

The executors of L. Helbert were the registered holders of 675 shares in a company. In March, 1866, they transferred them to Mozley. In May, 1866, a winding-up order was made. Mozley was put on the A list for these 675 shares and other shares amounting in all to 4347. In Feb., 1867, a call of £40 per share was made on Mozley, but he was only able to pay a small amount. In Dec., 1867, the executors were put on the B list, and in July, 1868, a call of £35

(c) Companies Act, s. 212 (1) (a)–(d).

per share was made on them :—**Held**, that as the evidence showed that there was a probability that the amounts received from the shareholders on the A list would not be sufficient to pay all the debts of the company, including some debts which were owing whilst L. Helbert or his executors were members, the executors were rightly put on the B list and a call was rightly made on them to the extent that Mozley was unable to pay the calls made on the 675 shares formerly held by the executors.

If the contributions made by the contributories on the B list are more than sufficient to pay the debts which were contracted while they were members, the balance must be returned to them (*d*).

A member may be liable for all the debts of the company, if he knows that the company is carrying on business with less than seven members (*e*).

A person who is wrongly put on the list of contributories may apply to the court to rectify the list. He does not lose this right by delay (*f*) unless his liability has been determined by an order of the court, in which case he must appeal within the proper time (*g*).

The liability is enforced by means of calls.

In a winding up by the court the liquidator can make a call with the sanction of the committee of inspection or an order of the court (*h*).

A call so made can be enforced against any person whose name has been finally settled on the list of contributories by an order of the court made in chambers on a summons by the liquidator (*i*). An order so made is conclusive unless overruled on appeal.

(*d*) *Re City of London Insurance Co.*, [1932] 1 Ch. 226.

(*e*) Companies Act, s. 31.

(*f*) *Re Mexican and South American Co.*, *Shewell's Case* (1867), 2 Ch. App. 387.

(*g*) *Re Elham Valley Rail. Co.*, *Dickson's Case* (1879), 12 Ch. D. 298.

(*h*) Companies Act, ss. 260, 273. W. U. Rules (1929), r. 84.

(*i*) W. U. Rules (1929), r. 88.

On a voluntary winding up the liquidator can make the call without any sanction.

He should follow the procedure adopted under a winding-up order, but is not bound to do so (l). The list of contributories settled by the liquidator in a voluntary winding up is *prima facie* evidence (m), but not conclusive evidence of the liability of the contributory (l). The call can be enforced by an action, or by summons to the court, and the shareholder is allowed, if he can, to disprove his liability.

So soon as a call is made, the liability of the contributory arises and is in the nature of a specialty debt (n).

Calls may be made in respect of partly paid shares in order to distribute the assets fairly among all the shareholders (o), unless the articles provide otherwise (p).

The liabilities of the contributories and their rights over the assets of the company are adjusted by the court.

Re Wakefield Rolling Stock Co., [1892] 3 Ch. 165

The capital was divided into 30,000 fully paid £1 shares and 24,000 shares of £5 each on which £1 was paid. Some of the £5 shares had been fully paid up in advance of calls. On the winding up, after paying the debts, there was not enough to pay all the contributories in full:—**Held**, the assets must be applied (1) in paying back the amount advanced on the £5 shares with interest; (2) in paying 16s. per share on the fully paid £1 shares (thus making them paid up to the same extent as the £5 shares with £1 paid); and (3) the rest to be divided *pro rata* between the holders of all shares.

A contributory who is a creditor of the company cannot set off his debt against his liability for

(l) Buckley, 11th ed., p. 501.

(m) Companies Act, s. 303 (1) (c).

(n) *Ibid.*, s. 214.

(o) *Welton v. Saffery*, [1897] A. C. 299.

(p) *Re Kinalan (Borneo) Rubber, Ltd.*, [1923] 1 Ch. 124.

calls (*q*), whether the call was made by the company before liquidation or by the liquidator afterwards.

In Re G. E. B. (a debtor), [1903] 2 K. B. 340

The liquidator obtained judgment against B. for calls. The company owed money to B. The liquidator served a bankruptcy notice on B. B. claimed that the notice was bad as he had a right to set off, and, therefore, did not owe anything to the company :—**Held**, the notice was good ; for he had no right to set off (*r*).

The court may order a contributory to pay any other debt due from him to the company (*s*). *When all the creditors are paid in full*, any debt due from the company to the contributory may be set off against subsequent calls (*t*). Debts due to the company and calls made before winding up may be set off against debts due from the company in case of unlimited companies (*a*).

A fully paid shareholder is a contributory for some purposes, *e.g.* where a distribution is to be made to the shareholders (*s*) ; but a fully paid shareholder to whom nothing is payable may not be put on the list of contributories merely to give the court the power to order him to pay his debts to the company.

Re Marlborough Club Co. (1868), L. R. 5 Eq. 365

The liquidator proposed to supplement the list of contributories by a list of fully paid shareholders who owed money for subscriptions, drinks, etc., to the club :—**Held**, these shareholders cannot be put on the list solely to give the court jurisdiction to enforce payment of debts due from them.

(*q*) Even if there is an express agreement to do so. *Re Law Car and General Insurance Corporation*, [1912] 1 Ch. 405.

(*r*) And see *Alliance Film Corporation v. Knoles* (1927), 43 T. L. R. 678.

(*s*) Companies Act, s. 259. *Re Aidall*, [1933] Ch. 323.

(*t*) Companies Act, s. 259 (3).

(*a*) *Ibid.*, s. 259 (2).

If a contributory dies, his personal representatives become liable to pay the calls out of his assets, and his estate may be administered by the court for this purpose (b).

If he becomes bankrupt, his trustee in bankruptcy represents him, and all calls made and the estimated value of future calls are provable in the bankruptcy (c).

The husband of a woman married before 1883 becomes liable as a contributory in respect of shares held by her (d).

If a contributory is about to abscond or remove his property in order to evade calls, he may be arrested and his property seized (e).

Every transfer of shares (except with the sanction of the liquidator) or alteration in the status of a shareholder, after commencement of the winding up, is void unless the court otherwise orders (f).

As between the contributories all books and papers of the company and of the liquidators are *prima facie* evidence (g).

A contributory is entitled to inspect the file of the company kept by the registrar (h).

(2) As to the creditors of the company.

In the winding up of any company whose assets are insufficient for the payment of its debts **the same rules prevail** as to (1) the respective rights of secured and unsecured creditors, (2) debts provable, and (3) the valuation of annuities and future and contingent liabilities, as are in force under the law of bankruptcy (i).

(b) Companies Act, s. 215 (3). (c) *Ibid.*, s. 216.

(d) *Ibid.*, s. 217.

(e) *Ibid.*, s. 271.

(f) *Ibid.*, s. 282.

(g) *Ibid.*, s. 340.

(h) W. U. Rules (1929), r. 19.

(i) Companies Act, s. 317.

This applies to a voluntary winding up if the company is insolvent (*k*).

Result of this Rule.

A **secured creditor** may either (1) value his security and prove in the winding up for the balance of his debt, or (2) give up his security and prove for the whole amount (*l*).

A judgment creditor who has levied execution and completed the execution by sale or recovery of the money due before the winding up may keep what he has recovered (*m*); but if before the sale or completion of the execution notice is served on the sheriff of the appointment of a provisional liquidator or of a winding up, the sheriff must hand over the property to the liquidator (*n*).

Certain “**preferential payments**” must be made before payment of other unsecured debts, and, where **the security is only a floating charge** secured by debentures, these preferential payments must be paid before the debenture-holders (*o*), but not before the costs of liquidation (*p*).

These preferential payments are—

(i) Rates and taxes for not more than one year.

(*k*) *Re Thos. Salt & Co., Ltd.*, [1908] W. N. 63.

(*l*) *Re Ligoniel Spinning Co., Ex parte Bank of Ireland* [1900] 1 L. R. 324.

(*m*) Or where he has been prevented from levying execution by a trick. *Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd.*, [1911] 2 K. B. 143.

(*n*) Companies Act, s. 325. The costs of the actual execution must be paid to the sheriff. Cf. *Re Woods (Bristol), Ltd.*, [1931] 2 Ch. 320.

(*o*) *Ibid.*, s. 94. This does not apply to a fixed charge though contained in a debenture which creates also a floating charge. *Re Lewis Merthyr Consolidated Collieries, Ltd.*, [1929] 1 Ch. 498.

(*p*) *Re Glyncorwg Colliery Co., Railway Debenture and General Trust Co. v. The Co.*, [1929] Ch. 951.

- (ii) Wages of a clerk or servant for not more than four months and not exceeding £200.

This may include the secretary (*q*), but not a managing director (*r*), or a contributor to a magazine (*s*).

- (iii) Wages of a workman for not more than four months and not exceeding £200.

Clause (ii) applies to the "black-coated" staff, and clause (iii) primarily to manual labourers (*s*).

- (iv) Compensation due to an employee under the Workmen's Compensation Act, 1925 (*t*).

- (v) Sums payable by an employer under the National Insurance, Pensions, and Unemployment Insurance Acts and Re-instatement in Civil Employment Act, 1944.

The relevant date for these calculations is—

- (a) in the case of a company ordered to be wound up compulsorily
 - (i) the date of the appointment (or first appointment) of a provisional liquidator; or
 - (ii) if no such appointment was made, the date of the winding up order; unless in either case the company had commenced to be wound up voluntarily before that date; and
- (b) in any other case the date of the passing of the resolution for the winding up of the company (*u*).

These preferential debts have priority also over a landlord's right of distraint, if exercised within three

(*q*) *Cairney v. Back*, [1906] 2 K. B. 746

(*r*) *Re Newspaper Proprietary Syndicate, Ltd.*, *Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349.

(*s*) *Re Beeton & Co., Ltd.*, [1913] 2 Ch. 279 and see *Re London Casino, Ltd.*, (1942), 167 L. T. 66.

(*t*) *Re Clemmons Aluminium, Ltd.* (1924), 94 L. J. K. B. 487.

(*u*) Companies Act, s. 319 (8) (d).

months before the date of the winding-up order, and they are a first charge on the goods so distrained or the proceeds of sale (v).

Where the company's liability to an injured employee or to other third parties is covered by insurance, the employee or third party can now claim the benefit of the company's rights against the insurers, and, if the liability is not fully covered by insurance, the claimant can prove for the balance (a).

Crown debts have no priority (b).

Unsecured creditors are paid in the following order :—

- (1) Preferential payments as above.
- (2) Other debts *pari passu*—except that
- (3) debts in respect of which a rate of interest is paid varying with the profits of a business are postponed until other debts are paid in full.

Debts which may be proved include " All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding in damages " (c).

Re Patent Floor Cloth Co, Dean and Gilbert's Claim
(1872), 41 L. J. Ch. 476

D. and G. were employed by the company as travellers on commission for three years. During the first year they made £400. The company was wound up. D. and G. claimed £800 damages:—**Held**, they can claim for a fair proportion of their prospective loss.

(v) *Ibid.*, s. 319 (7). The landlord stands in the place of the preferential creditor in respect of any moneys so paid.

(a) Workmen's Compensation Act, 1925, s. 7; Third Parties (Rights against Insurers) Act, 1930, s. 1.

(b) *Food Controller v. Cork*, [1923] A. C. 647. And as to income tax deducted from debenture interest, see *Re Lang Propeller, Ltd.*, [1927] 1 Ch. 120.

(c) Companies Act, s. 316. As to the measure of damages see *Re Vic Mill, Ltd.*, [1913] 1 Ch. 465. *Re Law Car and General Insurance Corporation*, [1913] 2 Ch. 103.

Proof of Debts

Persons who claim to be creditors must prove their debts within the time fixed by the liquidator (*d*).

If a creditor does not prove within the time fixed, he may still prove, and may then be paid out of any assets remaining in the hands of the liquidator; but he cannot upset any dividend which has been paid (*e*).

If he has not claimed enough in his proof, he may get leave to amend it (*f*).

The costs of proving a debt are added to the amount of the debt. But if the creditor commences an action for the debt before the winding up, and the liquidator continues to defend the action, and fails, the costs are paid first out of the assets (*g*).

The court has a discretion and has refused to allow costs to be paid in this way where the liquidator offered to allow the creditor to prove in the winding up for an amount to be ascertained in the winding-up proceedings (*h*).

The liquidator must not pay statute-barred debts if the shareholders object (*i*).

Rights of the Landlord

A landlord is not a secured creditor except so far as he has a right to distrain or is allowed by the court to do so (see p. 312, *post*).

The landlord may also have a right to re-enter under a proviso in the lease providing for forfeiture in case of liquidation; but the liquidator is allowed a year in which either to sell the lease or to apply to the court for relief against the forfeiture (*k*).

(*d*) Companies Act, ss. 264 and 273 and rule 104 of 1929.

(*e*) *General Rolling Stock Co., Joint Stock Discount Co.'s Claim* 1872), 7. Ch. App. 646.

(*f*) *Re Henry Lister & Co., Ltd., Ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417.

(*g*) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(*h*) *Cf. Rose v. Garaden Lodge Coal Co.* (1878), 3 Q. B. D. 235

(*i*) *Re Fleetwood, etc., Syndicate*, [1915] 1 Ch. 486.

(*k*) Law of Property Act, 1925, s. 146. *Pearson v. Gee and Braceborough Spa, Ltd.*, [1934] A. C. 272.

If the liquidator takes possession of leasehold property belonging to the company and occupies it for the purposes of the liquidation, he must pay the rent to the landlord in full during the period of his occupation (*l*).

If the liquidator does not take possession, the landlord can only prove for his rent (*m*); and the liquidator may be prevented from distributing the assets unless he makes provision for the future rent (*n*).

Disclaimer.—The liquidator can apply to the court for leave to disclaim the lease (*o*). If so, the liability for rent will cease; but the landlord will be entitled to prove at once for the damage which he suffers by the loss of rent, etc., due to the disclaimer (*p*).

The chief advantage of disclaimer is that it enables the liquidator to distribute the assets without making any special provision for the landlord's future claims.

Interest and Costs

A creditor can prove for interest on his debt up to the date of the winding up, as follows—

(1) If interest has been agreed to be paid, interest may be claimed at the agreed rate (*q*).

(*l*) *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322. If the liquidator takes possession, any sums due for breach of the repairing covenants must also be paid in full; *Re Levi & Co.*, [1919] 1 Ch. 416.

(*m*) It appears now that future rent can be proved for as a future debt under s. 316. *James Smith & Sons (Norwood), Ltd. v. Goodman*, [1936] Ch. 216.

(*n*) *Oppenheimer v. British and Foreign Exchange and Investment Bank* (1877), 6 Ch. D. 744.

(*o*) Companies Act, s. 323. The court will not allow disclaimer where third parties would be prejudiced. *Re Katherine et Cie, Ltd.*, [1932] 1 Ch. 70.

(*p*) *Re McEwan, Ex parte Blake* (1879), 11 Ch. D. 572; *Re Hide, Ex parte Llynvi Coal and Iron Co.* (1871), 7 Ch. App. 28.

(*q*) *Re Agricultural Wholesale Society*, [1929] 2 Ch. 261; but see *Re Bush, Lipton (B.), Ltd v. Mackintosh*, [1930] 2 Ch. 202, where this decision was doubted, and it was held that the rule in Bankruptcy limiting the dividend to 5 per cent. applied to the administration of an insolvent estate.

(2) If the debt is payable at a certain date under a written instrument, interest at 4 per cent. from that date.

(3) Otherwise interest at 4 per cent. from the date of a demand in writing stating that interest will be claimed (*r*).

If the company is insolvent, then both in a compulsory and a voluntary liquidation, interest ceases to run at the commencement of the winding up (*s*).

If the company is solvent, *i.e.* if there is a surplus after paying capital and interest on all debts up to the commencement of the winding up, interest is payable from that date up to the date of payment (*t*).

The taxation of a solicitor's bill of costs against the company must be dealt with in the winding up (*a*) even if the work was done before winding up, if the solicitor has submitted to the jurisdiction (*b*).

A creditor who has proved his debt may inspect the file of proceedings of the company kept by the registrar (*c*).

Set Off.—The same rules apply as in bankruptcy.

Where there have been mutual dealings between a creditor and the company, the debt due from one can be set off against the debt due from the other, and the creditor can only prove for the balance (*d*).

(*r*) W. U. Rules, 1929, r. 98. As to interest on a secured debt, see *ante*, p. 175, and *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601.

(*s*) *Re Thos. Salt & Co., Ltd.*, [1908] W. N. 63.

(*t*) *Re W. W. Duncan & Co.*, [1905] 1 Ch. 307.

(*a*) *Re Foss, Bilbrough, Plashitt and Foss*, [1912] 2 Ch. 161.

(*b*) *Re Palace Restaurants, Ltd.*, [1914] 1 Ch. 492.

(*c*) W. U. Rules, 1929, r. 19.

(*d*) Bankruptcy Act, 1914, s. 31, and see *Re H. E. Thorne & Son, Ltd.*, [1914] 2 Ch. 438. As to set off by a liquidator against an insolvent estate, see *Re Peruvian Railway Construction Co., Ltd.*, [1915] 2 Ch. 144, at p. 150, and as to set off between two companies in liquidation, *Re National Live Stock Insurance Co., Ltd.*, *Re National General Insurance Co., Ltd.*, [1917] 1 Ch. 628.

As to set off in case of calls, see p. 296.

Fraudulent Preference.—The bankruptcy rules as to fraudulent preference apply, as modified to meet the different circumstances of a company. This is now provided by s. 320 of the Companies Act, which enacts that any transfer of property, charge, payment or obligation made or incurred by a company unable to pay its debts as they become due, from its own money, in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the company is wound up, and the winding up commences within six months after the date of the transfer, charge payment or obligation, be deemed fraudulent and void as against the liquidator (*e*).

Re Jackson and Bassford, Ltd., [1906] 2 Ch. 467

The principal director of a private company guaranteed the overdraft of the company at its bankers, and the company agreed to give him debentures "whenever called upon by him to do so." The director called for his debentures less than four weeks before the company was wound up :—**Held**, the debentures were a fraudulent preference.

The sale of an insolvent business to a private company for shares or debentures may be set aside as fraudulent (*f*), or may be treated as an act of bankruptcy (*g*).

Consenting to judgment may amount to a fraudulent preference (*h*).

Money paid by way of fraudulent preference may be recovered by the liquidator ; it has been held that it

(*e*) Companies Act, s. 320 ; and see Bankruptcy Act, 1914, s. 44 as amended by s. 115 (3) of the Companies Act, 1947. *Re M. I. G. Trust, Ltd.*, [1933] Ch. 542, C. A.

(*f*) *Re Goldburg, Ex parte Silverstone*, [1912] 1 K. B. 384.

(*g*) *Re David and Adland, Ex parte Whinney*, [1914] 2 K. B. 694.

(*h*) But it was not so held in *Peat (Sir William Henry) v. Gresham Trust, Ltd.*, [1934] A. C. 252 ; and see *Re M. Kushler, Ltd.*, [1943] Ch. 248 ; [1943] 2 All E. R. 22.

forms part of the general assets of the company and is not subject to a floating charge in debentures (*k*). But now where any person becomes liable to re-pay money paid to him in satisfaction of a debt from the company to him, on the ground that the payment was a fraudulent preference of any surety or guarantor, that person is entitled to recover the amount repaid by him from the surety or guarantor, and the court may determine questions arising between the person to whom the payment was made and the surety or guarantor (*l*).

A *bona fide* set off may reduce the amount recoverable as a fraudulent preference ; but liabilities not in fact set off will not be treated as having been set off for this purpose (*m*).

Fraudulent Trading.

If it appears that the company has **carried on business with intent to defraud creditors or for any fraudulent purpose**, the court may order any persons who were responsible for the fraud to be **personally liable, without any limit**, for the debts of the company (*n*). A director may be disqualified (see p. 201, *ante*).

Re William C. Leitch Brothers, Ltd., [1932] 2 Ch. 71

In 1926 A., who was a perambulator manufacturer, sold his business to a company for 1,000 shares of £1 each and debentures for £4,000. The company appointed A. managing director at a salary of £1,000 per annum.

In 1930, when the company owed about £6,500 for goods supplied which it could not pay, A. ordered further goods

(*k*) *Re Yagerphone, Ltd.*, [1935] Ch. 392.

(*l*) Companies Act, s. 321.

(*m*) *Re B. P. Fowler, Ltd.*, [1938] Ch. 113 ; [1937] 3 All E. R. 781.

(*n*) Companies Act, s. 332. The section does not apply unless there is actual dishonesty. *Re Patrick and Lyon, Ltd.*, [1933] Ch. 786.

for about another £6,000, which became subject to the debentures. A. shortly afterwards appointed a receiver, who appointed A. manager, and various sums were paid to A. The company was wound up.

Held, "If a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment . . . it is in general a proper inference that the company is carrying on business with intent to defraud." A. was ordered to pay about £3,000 to the liquidator.

Money recovered from a person who has been trading fraudulently does not belong to the creditors who have been defrauded, but becomes part of the general assets of the company (o).

Deed of Arrangement.

An assignment by a company of all its property to a trustee for all its creditors is void (p).

If a floating charge is created within twelve months of a winding up, the charge is void except as to any money paid at the time the charge was given with interest at 5 per cent. per annum, or such other rate as may be prescribed by order of the Treasury, unless the company can be proved to have been solvent (q).

Re Columbian Fireproofing Co., Ltd., [1910]

1 Ch. 758

Money advanced a few days before the charge was given and in reliance on a promise to execute the charge was held to be money paid "at the time." (r).

(o) *Re Wm. C. Leitch Brothers, Ltd.*, (No. 2), [1933] Ch. 261.

(p) Companies Act, s. 320 (3), and see *Gonville's Trustee v. Patent Caramel Co., Ltd.*, [1912] 1 K. B. 599. A debenture containing a floating charge has been held to be an "assignment" within this section. *London Joint, etc., Bank, Ltd. v. Dickinson (H.), Ltd., Johnstone, Claimant*, [1922] W. N. 13.

(q) Companies Act, s. 322 and see *Re F. and E. Stanton, Ltd.*, [1929] 1 Ch. 180.

(r) See also *Re F. and E. Stanton, Ltd.*, [1929] 1 Ch. 180.

The payment must be a payment in cash to the company.

Re Orleans Motor Co., Ltd. [1911] 2 Ch. 41

In 1904 five directors of the company guaranteed the company's overdraft at the bank up to £2,000.

In Feb., 1910, the bank was pressing for payment and the directors resolved that £1,500 should be paid to the bank, and that in consideration of the directors finding £1,500 they should receive debentures. Each director gave the company a cheque for £500 and the company paid its cheque to the bank for £1,500.

In April, 1910, the company was wound up.

Held, "It is impossible to hold that any money was actually paid to the company at all. Three cheques passed through its hands, but they were never part of the company's assets to do what it liked with, since the company was under an obligation to hand them over to the bank." The debentures for £1,500 were held invalid (s).

The **reputed ownership clause** (t) (by which the property of other persons left in the possession of the bankrupt may pass to the trustee in bankruptcy) does not apply to the winding up of a company. •

Gorringe v. Irwell India Rubber and Gutta Percha Works (1886), 34 Ch. D. 128

C. & Co. owed money to the I. Company. The I. Company owed money to H. & Co. The I. Company wishing to pay H. & Co., wrote to them, "We hold at your disposal £425 due to us from C. & Co." No notice of this assignment was given to the debtor (C. & Co.). The I. Company was wound up:—Held, the assignment is good (as between the I. Company or their liquidator and H. & Co.). The reputed ownership clause does not apply to the winding up of companies.

(s) See, however, *Re Matthew Ellis, Ltd.*, [1933] Ch. 458, where, although money was paid by a director for the express purpose of being applied in paying a debt due to his firm, the Court of Appeal held (in the absence of any evidence of dishonest motive) that the money was paid *bona fide* to the company. A different conclusion was reached *Re Destane Fabrics, Ltd.*, [1941] Ch. 319.

(t) S. 38 (c) of the Bankruptcy Act, 1914.

(3) **As to the servants of the company.**—A winding up by order of the court operates as a discharge of the servants of the company.

Measures Brothers, Ltd. v. Measures, [1910] 1 Ch. 336

M. agreed to act as director for the company for seven years and that he would not engage in any competing business for seven years after he should cease to hold office. The company was ordered to be wound up :—**Held**, the winding-up order operated as a wrongful dismissal of M., and he was free from his agreement not to compete with the company.

A voluntary winding up which involves a discontinuance of the business also operates as a discharge, and may give rise to a claim for damages where there is an agreement for employment for a fixed time (*a*).

(4) **As to the officers of the company.**—When a winding-up order has been made, or a liquidator appointed in a voluntary winding up, the powers of the directors cease except so far as the company in general meeting or the liquidator sanctions their continuance (*b*).

When a winding-up order has been made, the court may summon any officer of the company, or any person indebted to the company, or who has property of the company in his possession, or who can give any information as to the company and order him to bring with him any books and documents relating to the company (*c*).

If the official receiver has reported that fraud has been committed, the court may order that any person who has taken part in the promotion of the company, or

(*a*) *Re Imperial Wine Co., Shirreff's Case* (1872), L. R. 14 Eq. 417, and *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K. B. 592.

(*b*) Companies Act, ss. 285 (2), 296 (2).

(*c*) Companies Act, s. 268.

has been a director or officer of the company, shall attend and be **publicly examined** on oath as to the formation and business of the company and as to his conduct (*d*).

There need only be a *prima facie* case of suspicion.

Re Bank of Hindustan, China and Japan, Fricker's Case (1871), L. R. 13 Eq. 178

F. held forty-five shares in the company and could not be found. MRS. E., his mother-in-law, refused to give his address :—**Held**, an order may be made for her examination.

Such an order will not be made merely for the purpose of enabling a dissentient shareholder in a reconstruction (see p. 338) to ascertain the value of his share of the assets (*Re British Building Stone Co., Ltd.*, [1908] 2 Ch. 450).

The examination may be directed to be made in open court ; but only in special circumstances (*e*).

The person examined must answer questions which relate to mere hearsay, but not questions which may tend to incriminate him (*f*).

If any director, promoter, liquidator or officer of the company has misapplied or retained money or property of the company or has been guilty of **misfeasance or breach of trust**, the court, may examine into his conduct and order him to repay or restore the money or property or to pay compensation.

The official receiver or liquidator or any creditor or contributory may apply to the court by summons for this purpose (*g*). The court can direct or authorise the liquidator to prosecute any officer or member of the company who has been guilty of any criminal offence in relation to the company, and may order the costs of the prosecution to be paid out of the assets of the company (*h*).

(*d*) Companies Act, s. 270.

(*e*) *Re Property Insurance Co., Ltd.*, [1914] 1 Ch. 775.

(*f*) The person examined may be entitled to his costs if he is a party or likely to be a party, but not otherwise (*Re Appleton, French and Scrافتon, Ltd.*, [1905] 1 Ch. 749).

(*g*) Companies Act, s. 333.

(*h*) *Ibid.*, s. 334.

An officer of the company may inspect the file of proceedings of the company free of charge (*i*).

“ **Officer of the company** ” includes the directors, managers, and secretary (*k*), and may include the solicitor (*l*), or auditors of the company (*m*).

(5) **As to dispositions by the company.**—Dispositions by the company of its property after the commencement of the winding up are void unless the court otherwise orders.

Re International Life Assurance Society, Gibbs and West's Case (1870), L. R. 10 Eq. 312

After the winding-up petition the company wanted money at once, and borrowed £5,000 from its bank, and gave the bank a charge for £5,000 on the proceeds of a call made before winding up, which would be paid in a few days :—**Held**, the money was borrowed to prevent the cessation of the company. Therefore the court ought to allow the charge.

The liquidator can make contracts, but only so far as necessary for the beneficial winding up of the company. See p. 317.

(6) **As to proceedings against the company.**—After the winding-up petition is presented the court may stay any proceedings against the company (*n*).

The court will usually do so when the petition stands over with a view to a scheme of arrangement being adopted (*o*).

(*i*) W. U. Rules, (1929), r. 19.

(*k*) Companies Act, s. 455.

(*l*) e.g. if he is employed at a salary. *Re Harper's Ticket Issuing and Recording Machine, Ltd., Hamlin v. The Co.*, [1912] W. N. 263, and see *Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406.

(*m*) See p. 248, *ante*.

(*n*) Companies Act, s. 226. *Re Margot Bywater, Ltd.*, [1942] Ch. 121; [1941] 3 All E. R. 471.

(*o*) *Bowkett v. Fuller's United Electric Works, Ltd.*, [1923] 1 K. B. 160.

After the winding-up order all proceedings against the company must cease, unless the court gives special leave for them to continue (*p*). And any distress or execution put in force against the assets of the company, unless completed before the commencement of the winding up, is void (*q*).

Thus a distress levied after the winding up for rent accrued due before winding up will usually be restrained (*r*).

But the court will not, as a rule, interfere if the distress was levied before winding up, though not completed till afterwards, even though it be for rent in advance (*s*). If rent accrues after the winding up, the landlord will be restrained from distraining, unless the liquidator takes possession for the convenience of the winding up. In this case the landlord will be allowed to distrain in full, for all costs incurred in the winding up are payable in full before the assets are distributed (*t*).

The same rules apply to a winding up under supervision.

On a voluntary winding up the court may, and usually does (*u*), restrain proceedings against the company.

Westbury v. Twigg & Co., [1892] 1 Q. B. 77

The plaintiff got judgment for a debt against the company on the same day as the voluntary winding up commenced. Next day the sheriff took possession in execution of the judgment:—Held, if on a compulsory winding up the execution would be stayed *ipso facto*, then the court has power to do so at any time before the sale.

(*p*) Companies Act, s. 231.

(*q*) *Ibid.*, s. 325.

(*r*) *Re Brown, Bayley and Dixon, Ex parte Roberts and Wright* (1881), 18 Ch. D. 649; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

(*s*) *Venner's Electrical Cooking and Heating Appliances, Ltd. v. Thorpe*, [1915] 2 Ch. 404.

(*t*) See note (*n*), p. 299.

(*u*) *Anglo-Baltic, etc., Bank v. Barber & Co.*, [1924] 2 K. B. 410.

(7) **As to costs.**—If the company, while in liquidation, brings or defends an action and is ordered to pay costs, they are paid first out of the assets of the company (a). The same rule applies in a voluntary liquidation (b). The court also provides for the payment of the costs of the liquidation (c).

Unless otherwise ordered, the assets are (for the purpose of payment of costs and expenses) applied in the following order—

(1) Fees and expenses incurred in getting in and realising the assets.

(2) Costs of the petition.

(3) Remuneration of special manager.

(4) Costs of making the company's statement of affairs.

(5) Costs of shorthand writers appointed to take examinations.

(6) Other necessary disbursements by the liquidator.

(7) Costs of persons properly employed by the liquidator with the sanction of the court or the committee of inspection.

(8) Remuneration of the liquidator.

(9) Out of pocket expenses of the committee of inspection (d).

(a) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(b) *Re Pacific Coast Syndicate, Ltd.*, [1913] 2 Ch. 26, and also in arbitrations, *Van Den Hurk v. R. Martens & Co., Ltd.*, [1920] 1 K. B. 850.

(c) Companies Act, s. 267.

(d) W. U. Rules (1929), r. 192.

CHAPTER XXIV

LIQUIDATORS

SECTION 1

On a winding up by the court

Appointment.—After the presentation of the petition, the court may appoint the official receiver or any other person to be a provisional liquidator before the winding-up order is made (*a*).

As soon as the winding-up order is made the **official receiver becomes provisional liquidator** (*b*). The official receiver summons separate meetings of creditors and contributories to determine whether applications shall be made to the court.

(1) To appoint a liquidator.

(2) To appoint a **committee of inspection**.

Committee of Inspection (*c*).

The liquidator is in some matters (see p. 317) subject to the control of this committee, or, where no such committee is appointed, of the Board of Trade. The committee consists of creditors and contributories or their attorneys. The numbers of each are determined by agreement or by the court. The committee meets at least once a month, and the liquidator or any member may summon a meeting.

The quorum is a majority of the committee. A member of the committee may resign or may be removed by an ordinary resolution at a meeting of creditors (if he represents

(*a*) Companies Act, s. 238.

(*b*) *Ibid.*, s. 239.

(*c*) *Ibid.*, ss. 252 to 254.

creditors) or of contributories (if he represents them); he vacates office if he becomes bankrupt or is absent from five consecutive meetings without leave.

A member of the committee of inspection is in a fiduciary position and must not make a profit for himself (*d*).

When a vacancy occurs, the liquidator must summon a meeting of creditors or contributories to fill the vacancy. But, if the liquidator thinks that it is unnecessary to fill the vacancy, he may apply to the court for an order that the vacancy be not filled (*e*).

If there is no committee, most of the powers of the committee devolve upon the Board of Trade, and may be exercised by the official receiver (*f*).

Special manager (*g*).

The official receiver while he is acting as liquidator may apply to the court to appoint a special manager, if he thinks that the business of the company or the interests of the creditors or contributories require it.

Such a manager has the powers of an ordinary receiver and manager, or such other powers as the court directs. He must give security, and his remuneration is fixed by the court* (*g*).

He must account to the official receiver.

Shortly after the winding up has commenced, the court appoints a liquidator (*h*), unless the liquidation is left in the hands of the official receiver.

If a liquidator is appointed, he must notify his appointment to the registrar, and give security not to make away with the assets, and he is not capable of acting as liquidator until this has been done (*i*). The official receiver must render to the liquidator an account of the liquidation down to the date of the appointment of the liquidator (*k*).

(*d*) *Re Bulmer, Ex parte Greaves*, [1937] Ch. 499; [1937] 1 All E. R. 323.

(*e*) Companies Act, s. 253 (7). (*f*) W. U. Rules (1929), r. 211.

(*g*) Companies Act, s. 263.

(*h*) *Ibid.*, ss. 237, 239.

(*i*) *Ibid.*, s. 240.

(*k*) W. U. Rules (1929), r. 210.

A corporation cannot be appointed liquidator (*l*). The liquidator should be an independent person; but the secretary of the company may be appointed, unless his conduct, or that of the directors, ought to be inquired into. The wishes of the creditors are regarded in the choice of the liquidator.

Re Land Financiers' Association (1878), 10 Ch. D. 269

The company was wound up and W. was appointed liquidator. 250 unsecured creditors applied by motion that two creditors might be appointed instead of W. The order was made as asked.

An irregularity in the appointment of a liquidator does not invalidate any act done by him in good faith (*m*).

The liquidator is paid a salary which is determined by the court. A liquidator may resign or may be removed by the court (*n*).

A contributory or a creditor can apply for his removal; but not an outside person (*o*). In case of any vacancy, the official receiver becomes the liquidator. *

The liquidator takes into his custody all the property of the company. **The property does not vest in the liquidator** on his appointment; but the court may now make an order vesting all or any of the company's property in the liquidator (*p*). He is a trustee for all persons who were creditors of the company at the date of the commencement of the winding up. (It is for this reason that the Limitation Act does not run after the winding up has commenced.) The liquidator represents both the company and the creditors; he is in the position of a receiver and manager of partnership

* (*l*) Companies Act, s. 335.

(*m*) W. U. Rules (1929), r. 223 (2).

(*n*) Companies Act, s. 242 (1). *Re Karamelli and Barnett, Ltd.*, [1917] 1 Ch. 203.

(*o*) *Re New De Kaap, Ltd.*, [1908] 1 Ch. 589.

(*p*) Companies Act, s. 244.

assets, and he must give the creditors and contributories every assistance in inspecting the books of the company, etc.

Powers of the liquidator (g).

(A) With the sanction of the court or of the committee of inspection :—

(1) To bring and defend actions in the name of the company.

If he brings an action in the name of the company, he does not become liable for costs ; but if he takes proceedings as liquidator in the winding up, he is personally liable, but has a right to be indemnified out of the assets of the company (r).

(2) To carry on the business of the company so far as may be necessary for the beneficial winding up.

Re Wreck Recovery and Salvage Co. (1880), 15 Ch. D. 353

The company was being wound up. L., one of the shareholders who believed in the value of the company's patents, made a contract with the liquidator whereby he was to have the use of the plant of the company to raise three sunken vessels at his own expense, the profits (if any) to go to the company :—**Held**, the contract was bad ; as it was not for the purpose of beneficial winding up, but to resuscitate the company (s).

(3) To appoint a solicitor.

(4) To pay any class of creditors in full.

(5) To make compromises with creditors, debtors and contributories.

(g) Companies Act, s. 245.

(r) See further, Halsbury's Laws of England, Hailsham ed., vol. V, s. 1003, p. 611.

(s) Contracts will be valid if the liquidator *bona fide* and reasonably thinks that they are necessary for the beneficial winding up. *Re Great Eastern Electric Co., Ltd.*, [1941] Ch. 241 ; [1941] 1 All E. R. 409.

(B) Without such sanction :—

- (1) To sell and transfer the property of the company.
- (2) To execute and seal documents and deeds on behalf of the company.
- (3) To prove in the bankruptcy of any contributory.
- (4) To draw bills of exchange and promissory notes : these will have the same effect as if drawn by the company in the course of its business.
- (5) To raise money on the security of the assets.
- (6) To take out in his own name letters of administration to any deceased contributory.
- (7) To appoint an agent to do any business which he is unable to do himself.
- (8) To do all things necessary for the winding up of the company and distributing the assets.
- (9) To summon meetings of creditors and contributories.

He may summon meetings at any time when he desires to ascertain the wishes of creditors or contributories (i) ; and he is bound to have regard to their wishes when ascertained.

He must summon meetings at any times fixed by the creditors or contributories in their meetings, or when requested in writing by one-tenth in value of the creditors or contributories (i).

The exercise of all these powers is subject to the control of the court.

Also, by the Winding-up Rules, 1929, the liquidator may exercise the following powers, which by the Companies Act are assigned to the court :

(i) Companies Act, s. 246.

- (1) **Fix a date by which creditors must prove their claims** or be debarred from all remedy against the company ;
- (2) **Settle the lists of contributories** (u).

There are two lists, (1) the "A list," or list of persons liable to contribute as present members, and

(2) the "B list," or list of persons who have ceased to be members within a year of the winding up.

Each list distinguishes between those who are liable personally and those who are liable as personal representatives, etc.

The list of contributories is *prima facie* evidence.

The liquidator is entitled and is bound to see that particulars of contracts for the allotment of shares otherwise than for cash are delivered to the registrar (*Re X. Co., Ltd.*, [1907] 2 Ch. 92).

(3) **To make calls** on the contributories for the purpose of paying the debts of the company and for adjusting the rights of the contributories *inter se* (a).

An immediate call may be made, though by the terms of allotment the calls are only payable by instalments ; for the statutory right of the liquidator to make calls takes the place of the company's right to to make calls under its agreement (*Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724).

Any order made by the court as to calls is conclusive.

Before the Act of 1929 it was only *prima facie* evidence against the real estate of a deceased contributory unless the heir or devisee was on the list of contributories (b).

(u) Companies Act, s. 257.

(a) See *Re Wakefield Rolling Stock Co.*, on p. 296, *ante*.

(b) Companies Act, 1908, s. 168.

The liquidator may now, with leave of the court, **disclaim** land subject to burdensome covenants, shares, unprofitable contracts, or other **property which is subject to liabilities**. This must be done within twelve months from the commencement of the winding up, unless the court extends the time (c).

Duties of liquidator.—His principal duty is to get in the property and pay the debts, and distribute any balance among the contributories (d). He may be liable for negligence if he distributes all the property, and allows the company to be dissolved without paying the creditors (d), or if he pays the wrong persons by mistake (e), and in this case he is not protected by the Trustee Act, 1925 (e); but he can always protect himself by obtaining the directions of the court, and this should be done in every case of doubt, or where large sums are involved.

SPECIAL NOTE

On the Powers and Duties of Liquidators

(This note is intended for the use of accountants and others specially interested in the position and duties of liquidators.)

On a winding up by the court.

The liquidator is under the control and supervision of the Board of Trade.

The duties of liquidators are defined partly by the Companies Act, but chiefly by the Companies (Winding Up) Rules, which also prescribe forms which must be followed so far as circumstances will allow.

(c) Companies Act, s. 323; and see p. 303, *supra*.

(d) See page 285, *ante*.

(e) *Re Windsor Steam Coal Co., (1901), Ltd., [1928] Ch. 609*; affirmed, [1929] 1 Ch. 151.

Notice of Appointment.

The liquidator must give notice of his appointment to the registrar and give security before he can act (*f*).

Settling List of Contributories.

The liquidator as soon as possible after his appointment appoints a time and place for settling the list, and gives notice in writing of the time and place to every person whom he intends to include in the list.

On the day so appointed the liquidator hears any persons who object to being put on the list, and then finally settles the list. He then gives notice to every person on the list, informing him that any application to vary the list must be made to the Court by summons within twenty-one days. The Court may vary the list or may extend the time for application to vary the list, and the liquidator may himself add to or vary the list.

The list shows the address and number of shares of each contributory, distinguishing the classes of shareholders and showing whether they hold in a representative capacity. The notice should show in what capacity each person is put on the list and for what number of shares (*g*).

The B₂ list is not settled until it has been shown that the present members are unable to satisfy the debts (*h*).

Calls.

If the liquidator desires to make a call :

(1) If there is no committee of inspection, he must get the leave of the court by summons, which must be served on every contributory at least four days before the call is made.

(2) If there is a committee, he should summon a meeting of the committee for the purpose of obtaining their sanction.

Notice of the meeting must be given in time to reach each member of the committee not less than seven days before the meeting, and must state the proposed amount of the call and the purpose for which it is to be made.

The notice must also be advertised.

(*f*) Companies Act, s. 240.

(*g*) W. U. Rules, (1929), rr. 78-83.

(*h*) Buckley, 10th ed., p. 296.

Any statements or representations made by contributories to the committee or liquidator must be considered before the call is sanctioned.

The majority of the committee may sanction the call.

The liquidator must file with the registrar the document making the call, and must serve on each contributory a copy of the resolution of the committee or order of the court with a notice stating the amount or balance due from him in respect of the call.

The call may be enforced by an order (i).

Admission and rejection of Proofs (k).

The liquidator fixes a date not less than fourteen days from the date of the notice on or before which the creditors must prove their debts or be excluded, and the liquidator must advertise the date so fixed and give notice of it to every person who appears in the statement of affairs to be a creditor or who to the liquidator's knowledge claims to be a creditor, and whose claim has not been admitted.

The debts must be proved by affidavit verified by production of vouchers, if required, and stating whether the creditor is a secured creditor or not (l).

Trade discounts must be deducted, but discounts not exceeding 5 per cent. agreed to be allowed for payment in cash need not be deducted.

Rent or other payments falling due at stated periods may be apportioned.

Future debts may be proved for with a deduction of a rebate at the rate of 5 per cent. per annum.

Where there are numerous claims as for wages to workmen, they can be proved for by one affidavit with a schedule.

The liquidator must examine every proof and must within twenty-eight days (m) either admit it in writing, or reject it in writing, stating his grounds, or require further evidence.

If he has given notice of intention to declare a dividend, his decision must be notified within fourteen days after the last date for lodging proofs (n).

(i) W. U. Rules (1929), r. 88.

(k) W. U. Rules (1929), rr. 89 to 116. (l) *Ibid.*, r. 93.

(m) *Ibid.*, r. 115.

(n) *Ibid.*, r. 115.

A creditor can appeal to the court against the rejection of a proof, on giving notice within twenty-one days of rejection and the liquidator, or in default, any creditor or contributory, can apply to the court to expunge a proof after it has been admitted, or to reduce its amount (*o*).

The liquidator on the first day of each month must file a list of proofs received during the month, showing whether they are accepted or rejected or stand over, and when a creditor gives notice of intention to appeal against the rejection of a proof the liquidator must file the proof within three days (*p*).

Dividends (*q*).

The liquidator must give not more than two months' notice to the Board of Trade of his intention to declare a dividend, and must give notice to all creditors mentioned in the statement of affairs who have not proved their debts, fixing a date (not less than fourteen days from the notice) up to which proofs may be lodged. If after this date a creditor wishes to appeal against the rejection of his proof, he must give notice within seven days, and the liquidator may set aside a sufficient sum to provide for the dividend on this debt, if proved, and the cost of proof.

The liquidator excludes from the dividend all proofs which have been rejected where no notice of appeal has been given within the specified time.

If the dividend has to be postponed for more than two months, fresh notice must be given to the Board of Trade, but no new notice need be given to creditors who have not proved.

When the dividend is declared, the liquidator transmits to the Board of Trade a list of the proofs filed with the registrar.

Where a dividend is to be returned to contributories, the liquidator must prepare a list of the persons to whom it is to be paid, and the amounts payable to each, and this is appended as a schedule to the order authorising him to make the return (*r*).

If too much is paid to the shareholders, they may be ordered to refund the amount (*s*).

(*o*) W. U. Rules, (1929), 89 to 116. (*p*) *Ibid.*, rr. 112, 113.

(*q*) *Ibid.*, r. 117. (*r*) *Ibid.*, r. 118.

(*s*) *Re Birkbeck Permanent Benefit Building Society*, [1915] 1 Ch. 91.

Security.

The Board of Trade directs what security shall be given and how. When security is given, a certificate of the Board is filed with the registrar.

The liquidator pays the costs of giving security, including premiums to guarantee societies, and is not entitled to have this refunded out of the assets (*t*).

If the liquidator fails to give security, the court may rescind the order appointing him, and if he fails to keep up his security, he may be removed. The same proceedings will then be taken as on the first appointment of a liquidator (*u*).

Remuneration.

The liquidator's remuneration (unless the court otherwise orders) is fixed by the committee of inspection. It consists of a commission partly on the amount realised (less sums paid out of their securities to secured creditors other than debenture holders) and partly on the dividends distributed.

The Board of Trade may apply to the court to reduce the remuneration.

If there is no committee, the scale of fees payable on realisation and distribution by the official receiver applies (*a*).

The liquidator must not receive any further remuneration or gift from any person connected with the company, nor must he share his remuneration with any such person (*b*).

A member of the committee of inspection must not without the sanction of the court receive any remuneration or make any profit, directly or indirectly, out of the liquidation (*c*).

Payment of Moneys (*d*).

Moneys received by the liquidator must be paid into the Companies Liquidation Account at the Bank of England as directed by the Board of Trade, unless the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the company's business or obtaining advances it would be an advantage for him to have an account at

(*t*) W. U. Rules, (1929), r. 57.

(*u*) *Ibid.*, r. 58.

(*a*) *Ibid.*, r. 157.

(*b*) *Ibid.*, r. 158.

(*c*) *Ibid.*, r. 161.

(*d*) Companies Act, s. 248; W. U. Rules (1929), rr. 167, 168.

some other bank, in which case the Board may authorise payment of the moneys to his account as liquidator of the company at some other bank selected by the committee for such time as the Board shall direct, or until they order the account to be closed. All payments out of such an account must be by cheque, bearing the name of the company and signed by the liquidator and countersigned by at least one of the committee of inspection, and by any other person appointed by the committee.

The liquidator must not retain in his hands sums over £50 for more than ten days unless authorised to retain more by the Board of Trade. If he does, he is liable

- (i) to pay interest on the sums retained at 20 per cent. per annum,
- (ii) to disallowance of his remuneration by the Board,
- (iii) to dismissal,
- (iv) to refund expenses occasioned by his default.

He must not pay any moneys into his private banking account.

The court may order moneys due to the company to be paid into the liquidator's account at the Bank of England (e); and all moneys representing unclaimed or undistributed assets which have remained unclaimed or undistributed for six months must be paid into the same account (f).

Any such moneys remaining in his hands on the dissolution of the company must be paid in at once (g).

Meetings of Creditors and Contributories.

No meetings of the company as such are held during a winding up by the court.

The first meetings of creditors and contributories are summoned by the official receiver within one month (or, if a special manager has been appointed, within six weeks) after the winding-up order (h).

The notice to creditors states the time within which they must lodge their proofs in order to be entitled to vote at the first meeting (i).

The official receiver also gives notice of these meetings to the directors, and may require them to attend, and sends to each creditor and contributory a summary of the

(e) Companies Act, s. 261.

(f) *Ibid.*, s. 343.

(g) W. U. Rules (1929), r. 196.

(h) *Ibid.*, rr. 119, 120.

(i) *Ibid.*, r. 122.

company's statement of affairs showing the causes of failure, etc.

In addition :—

The liquidator may also summon meetings of creditors and contributories for the purpose of ascertaining their wishes (*k*).

The liquidator must summon meetings—

- (a) when requested in writing by one-tenth in value (see p. 318).
- (b) to fill vacancies in the committee of inspection, but if he thinks this is unnecessary, he may apply to the court for an order that the vacancy be not filled (*l*).

The liquidator summons such meetings by seven days' notice in the *Gazette* and one local paper, and by sending notice by post to every person appearing by the company's books to be a creditor or contributory as the case may be (*m*).

The meetings should be held at the place most convenient to the majority of the creditors or contributories and the meetings of each may be held at different times and places (*n*).

Where a meeting is summoned by the liquidator, he, or someone nominated by him, is chairman (*o*).

Resolutions are passed by a majority in number and value, present in person or by proxy. The value in case of contributories is determined by their voting power under the articles (*p*).

Where a majority in number vote one way and a majority in value vote the other, *e.g.* on a question whether the official receiver shall act as liquidator, the court must decide (*q*).

The liquidator must file with the Registrar a copy of every resolution passed (*r*).

The quorum at each meeting is three.

If the quorum is not present within half an hour, the meeting must be adjourned to the same date in the following

(*k*) Companies Act, s. 246; W. U. Rules (1929), r. 125.

(*l*) Companies Act, s. 253 (*7*).

(*m*) W. U. Rules (1929), r. 127.

(*n*) *Ibid.*, r. 129.

(*o*) *Ibid.*, r. 131.

(*p*) *Ibid.*, r. 132.

(*q*) Cf. *Re Bloxwich Iron and Steel Co.*, [1894] W. N. 111.

(*r*) W. U. Rules (1929), r. 133.

week, unless the chairman appoints some other date not less than seven or more than twenty-one days after the meeting (s).

A creditor cannot vote unless he has lodged a proof within a specified time and his proof has been admitted. He cannot vote in respect of unascertained debts, and in case of secured debts he must surrender his security, or value it and only vote in respect of the balance (t).

The chairman can admit or reject a proof for the purpose of voting, or may allow the creditor to vote subject to the vote being declared invalid (a).

Proxies may be used at meetings. They must be in the specified form (b). The liquidator may be appointed a proxy. He must not solicit proxies for his own appointment (c).

Advertisements, Notices, and Reports.

The liquidator must immediately advertise his appointment and the appointment of the committee of inspection, and must pay the expense of gazetting the notice of his appointment (d). Whenever any proceedings are advertised in the *Gazette*, the liquidator must file a memorandum referring to and giving the date of the advertisement. He must keep a copy of every local paper containing an advertisement relating to the liquidation, and must file a memorandum referring to it (e).

If the liquidation is not concluded within one year, the liquidator must send to the registrar within thirty days after the expiration of the first year of the liquidation, and subsequently at intervals of half a year, a statement in form 92 in the Rules as to the proceedings and position of the liquidation, commencing from the date of his appointment and brought down to the end of one year from the commencement of the winding up.

The statement must be made in duplicate, and is open to the inspection of creditors or contributories on payment of a fee.

(s) W. U. Rules (1929), r. 136.

(t) *Ibid.*, rr. 137-139.

(a) *Ibid.*, r. 141.

(b) Forms 80 and 81 in appendix to Rules of 1929.

(c) *Ibid.*, rr. 144-154.

(d) *Ibid.*, r. 56.

(e) *Ibid.*, r. 216.

It must be verified by affidavit. If he has not received or paid anything, he must still send in the statement with an affidavit of no receipts (*f*).

The liquidator must report to the registrar the order for dissolution of the company (*g*).

Accounts (*h*).

A liquidator at the end of six months from the winding-up order, and at the end of every subsequent six months, must send his accounts to the Board of Trade. They must be kept in duplicate in a cash book in a special form prescribed by the Board, and must be verified by affidavit. He must also send such vouchers and information as the Board requires for the purposes of audit. Two copies are filed, and the account is printed and sent by the Board to every creditor and contributory.

He must send with the first account a summary of the company's affairs showing the amounts realised, and at the end of every six months a report upon the position of the liquidation. When the assets are fully realised, he must send in his account forthwith.

He must also send a summary with sufficient printed copies to be sent to all the creditors and contributories.

If the liquidator carries on the company's business, he must keep a distinct trading account and incorporate the weekly totals in the cash book. The trading account must be verified by affidavit at least once a month, and submitted to the committee of inspection to be examined and certified.

The Board keeps an account of the receipts and payments of every company in liquidation.

The committee of inspection may request that balances not required for the time being may be invested.

If the balance exceeds £2,000, the liquidator may give notice that it is not required, and the company then becomes entitled to interest at 2 per cent. per annum (*i*).

(*f*) Companies Act, s. 342 (penalty £50 a day) ; W. U. Rules (1929), rr. 194, 195.

(*g*) Companies Act, s. 274 (penalty £5 a day).

(*h*) *Ibid.*, s. 249 and W. U. Rules (1929), rr. 172, 173.

(*i*) Companies Act, s. 362.

Books and Papers.

A liquidator must keep (*k*) a "Record Book" of minutes of meetings and resolutions of the meetings of creditors and contributories and of the committee of inspection, and other matters necessary to give a true view of his administration. But he need not enter any confidential document, such as opinions of counsel. He must also keep a "cash book" in a form directed by the Board of Trade and enter his receipts and payments.

These books are open to the inspection of creditors and contributories, but they are not entitled to inspect the books and papers of the company except under an order of the court (*l*).

The liquidator must submit the record book and cash book, with vouchers, etc., to the committee of inspection (if any) when required, and not less than once every three months, for audit.

If any books, papers or other assets of the company are in the hands of any shareholder, agent or officer of the company, the liquidator can apply to the court for an order that they be delivered up to him (*m*).

When the company is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of as the court directs, and after five years from the dissolution the responsibility of the liquidator or any person to whose custody they have been committed ceases (*n*).

The Board of Trade may at any time on the application of the liquidator direct that any books and papers no longer required for the purposes of the liquidation may be sold or destroyed (*o*).

Release.

The liquidator is under a statutory liability, on which he may at any time be sued by creditors or contributories, until he has obtained his release.

He can apply for his release to the Board of Trade, if:—

(*k*) Companies Act, s. 247 and W. U. Rules (1929), rr. 169, 170.

(*l*) *Ibid.*, s. 266.

(*m*) *Ibid.*, s. 258.

(*n*) *Ibid.*, s. 341.

(*o*) Winding-up Rules (1929), r. 178 (2).

(1) he has realised all the property of the company or so much as can be realised without needlessly protracting the liquidation, and has distributed a final dividend to the creditors and adjusted the rights of the contributories and made a final return ; or

(2) he has resigned ; or,

(3) he has been removed from his office.

¶ He applies to the Board for a report on his accounts.

Before applying for his release, he must give notice of his intention to all the creditors who have proved, and to all the contributories, and send them a summary of his receipts and payments (*p*).

Any creditor or contributory may object to the release, and the Board grants or withholds it as it thinks fit. The Board's decision is subject to appeal to the court, and the court may charge the liquidator with the consequence of any default on his part.

The release when granted discharges the liquidator from all liability in respect of his conduct as liquidator, and can only be set aside on proof of fraud or concealment of material facts (*q*). The order granting a release must be gazetted. If a liquidator dies or resigns after his release, no new liquidator is appointed, but the official receiver remains liquidator (*r*).

Resignation (*s*).

If a liquidator desires to resign, he must summon separate meetings of the creditors and contributories. If they both by ordinary resolution agree to accept his resignation, he files with the registrar a memorandum of his resignation, and sends notice to the Official Receiver and his resignation thereupon takes effect. In any other case he must report the result of the meetings to the court and to the Official Receiver and the court determines whether his resignation shall be accepted.

When a liquidator resigns or is removed, he must hand over to the Official Receiver or the new liquidator all his books and the books, papers and accounts of the company, and his release cannot take effect until he has done this (*t*).

(*p*) W. U. Rules (1929), r. 202. (*q*) Companies Act, s. 251.

(*r*) W. U. Rules (1929), r. 56 (*7*).

(*s*) *Ibid.*, r. 165.

(*t*) *Ibid.*, r. 178.

Removal.

A liquidator can be removed

1. By the Court

- (a) for failing to keep up his security (see p. 324).
- (b) for any due cause (s. 242) (*u*).

2. By the Board of Trade

- (a) For retaining balances of more than £50 for more than ten days (*v*).
- (b) The Board may, on complaint of a creditor or contributory, take such action as they think fit, if the liquidator does not faithfully perform his duties (*w*).

3. On Bankruptcy.

If a receiving order is made against a liquidator, he is thereupon deemed to have been removed (*x*).

SECTION 2

On a Voluntary Winding up**Appointment.**

(1) In case of a "member's voluntary winding up" (see p. 282, *ante*).

The company in general meeting makes the appointment (*y*).

A special resolution is not necessary, nor need special notice be given of the intention to appoint liquidators.

Re Trench Tubeless Tyre Co., Bethell v. Trench Tubeless Tyre Co., [1900] 1 Ch. 408

Notices were sent out of a meeting to confirm a resolution to wind up and to appoint W. as liquidator. At the meeting M. was appointed:—**Held**, the appointment was good, as no notice was needed.

(*u*) *e.g.* where he insists on acting in the interests of the shareholders alone, though the assets are insufficient to pay the creditors in full. *Re Rubber and Produce Investment Trust*, [1915] 1 Ch. 382.

(*v*) Companies Act, s. 248.

(*w*) *Ibid.*, s. 250.

(*x*) W. U. Rules (1929), r. 166.

(*y*) Companies Act, s. 285.

If a vacancy occurs in the office of liquidator, a general meeting of the company may be convened by any contributory to fill the vacancy (a).

(2) In case of a "creditors' voluntary winding up" (see p. 283, *ante*).

The meetings of members and creditors called by the company (see p. 283, *ante*) may each nominate a liquidator. In case of difference, the liquidator appointed by the creditors is the liquidator, subject to an application to the court (b).

The court may remove a liquidator for due cause (c), and appoint another, or may appoint an additional liquidator (d).

If the appointment of the liquidator is defective, he cannot sue for his remuneration; but if the company or the new liquidator take advantage of his services, he can claim reasonable payment (e).

If the company is insolvent, the remuneration should be fixed by the court (f).

A liquidator in a voluntary winding up is not subject to the control of the Board of Trade to such an extent as a liquidator in a compulsory winding up; but he is bound to furnish to the Board accounts and particulars of moneys in his hands if directed so to do by the Board; and the Board may audit his accounts (g).

If there are several liquidators, their powers may be exercised by any one or more of them as determined at the time of their appointment, or otherwise by any two or more of them (h).

(a) Companies Act, s. 286.

(b) *Ibid.*, s. 294.

(c) *Ibid.*, s. 304, (2).

(d) *Re Sunlight Incandescent Gas Lamp Co.*, [1900] 2 Ch. 728.

(e) *Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw*, [1904] 2 K. B. 327.

(f) *Re Beni-Felkai Mining Co., Ltd.*, [1934] Ch. 406. *Re Mortimers (London), Ltd.*, [1937] Ch. 289; [1937] 2 All E. R. 363.

(g) W. U. Rules (1929), rr. 197, 192.

(h) Companies Act, s. 303 (3).

**Re London and Mediterranean Bank, Bolognesi's
Case (1870), 5 Ch. App. 567**

After winding up, a director, who was also one of the four liquidators, accepted a bill of exchange. No authority had been given for one liquidator to act alone :—**Held**, the company was not bound to pay.

**POWERS OF LIQUIDATORS ON VOLUNTARY
WINDING UP.**

The liquidator may—

A. Without the sanction of the court :

(1) Exercise all the powers given by the Act to a liquidator appointed by the court except where special sanction is required (see heading B. below) (*k*).

(2) Settle the list of contributories.

(3) Make calls (*k*).

(4) Call meetings of the company.

B. With the sanction of an extraordinary resolution of the Company (and, in the case of a creditors' voluntary winding up, of the court or the committee of inspection) :

(1) Pay any classes of creditors in full.

(2) Compromise with creditors.

(3) Compromise calls, liabilities, debts, and claims between the Company and contributories and other debtors (*k*).

C. With the sanction of a special resolution,

Sell the assets of the company for shares on a reconstruction under Sect. 287. See p. 337.

**Special Note on the Rights and Duties of
Liquidators in a Voluntary Winding up**

(This note is intended for accountants and others specially interested in the position of liquidators.)

(*k*) Companies Act, s. 303.

Notice of Appointment.

The liquidator must within twenty-one days after his appointment deliver to the Registrar a notice of his appointment in the form prescribed by the Board of Trade (l).

MEETINGS

The procedure now depends upon whether the winding up is a "members'" or a "creditors' voluntary winding up" (m).

General Meetings of the Company.

See p. 284, *ante*.

Final Meeting.

See p. 284, *ante*.

Remuneration.

This may be fixed by the company in general meeting, either at the time of his appointment or later, or by the court. Sometimes the liquidator takes such remuneration as he considers proper, and then at the final meeting (n) his accounts are passed, including the appropriation of his remuneration. Any creditor or contributory may apply to the court to revise any decision as to remuneration. The remuneration is payable, with the other costs of liquidation, out of the assets of the company in priority to all other claims (o).

Proof of Debts.

The rules as to receiving proofs of debts are the same as in the case of a winding up by the court, except

- (1) no notice of the date fixed need be given to persons claiming to be creditors,
- (2) no time is fixed within which the acceptance or rejection of a proof need be notified, and
- (3) proofs need not be filed (p).

Calls.

The liquidator usually gives the same notices to the

(l) Companies Act, s. 305. Penalty £5 a day.

(m) See pp. 282, 283, *ante*. (n) See p. 284, *ante*.

(o) Companies Act, s. 309.

(p) W. U. Rules (1929), rr. 109, 112, 113, 115.

contributories as on a winding up by the court, but he is not bound to do so (g).

Statements to the Registrar.

In case the liquidation continues for more than a year, the liquidator must make the same statements to the Registrar as in a compulsory liquidation (r). See p. 327.

Payments of Moneys.

A liquidator in a voluntary liquidation is not bound to pay his balances into the company's liquidation account at the Bank of England; but he is bound to pay in any moneys representing unclaimed or undistributed assets which have been in his hands for more than six months, as in the case of a compulsory liquidation. And on dissolution of the company he must pay in all moneys representing unclaimed or undistributed assets or dividends (s).

Books and Papers.

When the company is about to be dissolved, the books and papers may be disposed of as the company by extraordinary resolution directs. The responsibility of the liquidator for the books and papers ceases after five years from the dissolution.

SECTION 3

Winding up under Supervision

The court may appoint a liquidator in addition to the liquidator already appointed by the company, and he has the same powers as if he had been appointed by the company.

The court may remove any liquidator, whether appointed by the company and continued by the court or appointed by the court, and any vacancy may be filled by the court (t).

As to the powers of a liquidator under a supervision order, see Chapter XXII.

(g) Buckley, 11th ed., p. 501.

(r) Companies Act, s. 342.

(s) W. U. Rules (1929), r. 196.

(t) Companies Act, s. 314 (3).

CHAPTER XXV

RECONSTRUCTION AND AMALGAMATION

RECONSTRUCTION occurs when a company transfers the whole of its undertaking and property to a new company, under an arrangement by which the shareholders of the old company are entitled to receive some shares or other similar interests in the new company.

This can be done in three ways—

- (1) A sale by the company of the whole of its undertaking to a new company, under the powers contained in the Memorandum of Association.
- (2) A sale by the liquidator of the undertaking of the company under s. 287.
- (3) A scheme of arrangement under s. 206.

Amalgamation implies the combination of two or more companies or the businesses of two or more companies into one company or into the control of one company. Amalgamation can take place by the sale of the businesses of one or more companies to another existing company in either of the three ways mentioned above, or it can take place by a sale of all, or a large proportion, of the shares in one or more companies by the shareholders to another company (a).

(a) This is an amalgamation in a business sense, though it has been held not to be an amalgamation under s. 10, sub-s. 3, of the Trustee Act, 1925. *Re Walker's Settlement, Royal Exchange Assurance Corporation v. Walker*, [1935] Ch. 567.

1. A sale under the memorandum can be effected where the company does not require further capital from its shareholders, and where it is not necessary to make the winding up of the old company an essential part of the arrangement. The old company sells its undertaking to the new company for shares in the new company, and, after the transaction is complete, the old company is wound up and the shares of the new company distributed among its members according to their rights.

2. A sale under s. 287 is necessary when a company needs more capital and cannot get it without putting some pressure on the existing shareholders. To do this a new company is formed, and the old company, by its liquidator, sells its undertaking to the new company in return for shares in the new company, in such a way that each shareholder in the old company is entitled to one or more shares in the new. But whereas the shares in the old company were fully paid, those in the new company are only partly paid, so that each shareholder must either undertake a fresh liability for calls or give up his shares.

This can only be carried out under the provisions of s. 287 (b), which provides an ample safeguard for the rights of shareholders who dissent from the scheme provided they notify their dissent in the proper way.

The sale should also be carried out under this section where the sale is for fully paid shares, if it is an essential part of the arrangement that the company is to be wound up (see p. 340.)

By section 287, if a company is being or is **proposed to be wound up** altogether voluntarily, and its property is proposed to be transferred or sold to another company, the liquidators of the first company may, **with the**

(b) Or in the case of a creditors' voluntary winding up, under s. 298 with the sanction of the court or the committee of inspection.

sanction of a special resolution, receive in compensation shares, etc., in the other company to distribute among the members of the first company. This is to be binding on the members of the first company. **But if any member** who has not voted for the special resolution **expresses his dissent** in writing, addressed to the liquidator and left at the registered office of the company within seven days after the passing of the resolution, **he may require the liquidator either—**

- (1) To abstain from carrying the resolution into effect ;
or
- (2) to purchase his interest, at a price to be determined by agreement or in default by arbitration.

The money must be paid before the company is dissolved.

If within a year an order is made for winding up by the court or under supervision, the resolution becomes void unless sanctioned by the court (c).

Thus, the parties to such an arrangement can never be sure that it will ultimately be valid and binding, and the difficulty cannot be got over by applying to the court for its sanction, unless a winding-up order has been made. The only way to make the arrangement certain is to apply to the court for an order for winding up under supervision, and when the order is made, to apply that the arrangement may be sanctioned. This was done in *Re New Flagstaff Mining Co.*, [1889] W. N. 123.

If a shareholder does not dissent in the manner provided by the Act within seven days, he loses his rights in the old company.

The notice of dissent must comply in all material respects with the provisions of the Statute.

(c) A contributory may petition to wind up the company for the purpose of defeating such a scheme under this provision (*Re Consolidated South Rand Mines, Deep, Ltd.*, [1909] 1 Ch. 491).

Re Union Bank of Kingston-upon-Hull
(1880), 13 Ch. D. 808

Held, that the notice of dissent must contain express notice to the liquidator to abstain from carrying the resolution into effect or to purchase the shares (*d*).

But an informality which is merely technical may be waived by the liquidator.

Brailey v. Rhodesia Consolidated, Ltd.,
[1910] 2 Ch. 95

The registered office of the company was in Rhodesia. B., a shareholder, sent his notice of dissent to the liquidator in London. The liquidator acknowledged the receipt of the notice and took no objection to its form for more than three weeks :—**Held**, the notice was sufficient.

The executors of a deceased shareholder have a right to dissent (*e*).

If there are many dissentient shareholders who give notice of dissent within the proper time and in the proper manner, it becomes very difficult for a company to be reconstructed, for each dissentient shareholder thereby becomes entitled to the value of his share in the company, and this is determined, not by the market value of the share, but by the value of an aliquot part of the whole assets of the company, to be determined, if necessary, by arbitration. Hence companies have frequently tried to evade the Act.

A company cannot deprive its shareholders of their rights as dissentients under this section either directly or indirectly, for—

(1) Any provision in the Articles depriving members of their rights under this section is void.

Payne v. Cork Co., Ltd., [1900] 1 Ch. 308

The Articles gave the liquidator power on a winding up of the company to sell the undertaking for shares in another

(*d*) Followed *Re Demarara Rubber Co., Ltd.*, [1913] 1 Ch. 331.

(*e*) *Llewellyn v. Kasintoe Rubber Estates, Ltd.*, [1914] 2 Ch. 670.

company with the sanction of a special resolution, and provided that, notwithstanding section 287 (then section 161 of the Act of 1862), the shareholders should not have power to require him to buy their shares :—**Held**, the Article is bad.

(2) Schemes by which a company sells its undertaking under a power to do so contained in the Memorandum, and provides for the distribution among its members of the shares or other consideration to be received from the new company, are void unless they make proper provision for the rights of dissentient shareholders (*f*).

**Bisgood v. Henderson's Transvaal Estates,
Ltd., [1908] 1 Ch. 743**

The company by special resolution approved a scheme for the sale (under a power in its Memorandum) of all its undertaking to a new company for shares in the new company of £1 each credited as paid up to the extent of 17s. 6d. per share only. The shares in the new company were to be distributed among the shareholders in the old company. If any shareholders did not approve, the shares to which they were entitled were to be sold and they were to be paid their proportion of the purchase price :—**Held**, the scheme was *ultra vires* and void (*g*).

A company can now sell its assets under s. 287 to a foreign company (*h*).

3. When a reconstruction is carried out as a **scheme of arrangement** under s. 206 (see p. 287, *ante*), the court may require the rights of dissentient shareholders to be properly protected in the same way as under s. 287 (*i*).

(*f*) As to the rights of the shareholders to set aside the transaction after it has been completed, see *Clinch v. Financial Corporation* (1868), 4 Ch. App. 117.

(*g*) Followed *Etheridge v. Central Uruguay Northern Extension Rail. Co.*, [1913] 1 Ch. 425.

(*h*) Companies Act, s. 287 (1).

(*i*) *Re General Motor Cab Co., Ltd.*, [1913] 1 Ch. 377. *Re Sandwell Park Colliery Co., Ltd.*, [1914] 1 Ch. 589.

When a reconstruction or amalgamation is carried out under section 206 by the transfer of the undertaking of one company to another, the court may make an order for the transfer of the undertaking property or liabilities of the one company to the other, or providing for the appropriation to the members of the transferor company of shares, etc., in the transferee company, and providing for the dissolution of the old company without winding up (*k*).

Where a meeting of creditors or any class of creditors is summoned under Sect. 206, a statement must be sent with the notice convening the meeting, explaining the effect of the compromise or arrangement and in particular the manner in which the interests of the directors will be directly or indirectly affected. Where debenture-holders are affected, similar information must be given as respects the trustees of any debenture trust deed (*l*).

Any person who is or has been a director must give notice to the directors of such matters relating to himself as may be necessary for the purpose of the disclosures mentioned above (*m*).

Sale of Shares.—A result similar to reconstruction can be carried out by a sale by the members of their shares to another company (called "the transferee company.") If the holders of nine-tenths in value of the shares whose transfer is involved have approved the scheme, the company can serve notice on the dissentients that it desires to purchase their shares on the terms of the scheme, and these shares will be acquired by the company accordingly, unless the court otherwise orders (*k*).

In calculating the nine-tenths, shares held by the

(*k*) Companies Act, s. 208. The liabilities under contracts for service are not transferred by such an order. *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] A. C. 1014; [1940] 3 All E. R. 549.

(*l*) Companies Act, s. 207.

(*m*) *Ibid.*, s. 207 (5).

transferee company or its nominee or subsidiary are not counted. Where the transferee company or its nominee or subsidiary hold more than one-tenth of the aggregate number of the shares affected, or any class of such shares, the section does not apply unless the transferee company offers the same terms to all the holders of the shares affected and the holders who approve the scheme are not less than three-fourths in number of the holders of those shares. Where the transferee company as a result of the scheme holds not less than nine-tenths of the shares of the transferor company, notice must be given by the transferee company to the holders of the remaining shares, and the holders may within three months require the transferee company to acquire their shares. The transferee company is then bound to acquire the shares in question on the same terms as the other shares acquired or as the court may order (*n*).

A dissenting shareholder can apply to the court within one month after the notice is given by the company (*o*).

Where the undertaking of the company is transferred under methods (1), (2), or (3), **no compensation** can be received by the directors **for loss of office**, or in consideration for retirement, unless the amount is disclosed to the shareholders and sanctioned by them. Where an amalgamation takes place by a sale of shares, the directors must see that particulars of the proposed payments are sent with the notice of the offer to the shareholders, and the amount of any proposed payment to the directors must be stated in the notice sent to the shareholders (*p*).

Stamp Duties.—When a reconstruction or

(*n*) Companies Act, s. 209.

(*o*) Companies Act, s. 209; *Re Everite Locknuts, Ltd.*, [1945] Ch. 220; [1945] 1 All E. R. 401.

(*p*) *Ibid.*, ss. 191, 192; and see p. 207, *ante*.

amalgamation is carried out by a sale of the undertaking to a new company in consideration of the issue of shares to the shareholders of the old company, or by a sale of not less than 90 per cent. of the shares of one company to another, the stamp duty payable on the capital of the new company, and any transfers by the old company can be very greatly reduced if the provisions of s. 55 of the Finance Act, 1927, are properly complied with (*q*).

(*q*) 17 & 18 Geo. 5, c. 10, as amended by Finance Acts, 1928, s. 31, and 1930, s. 41. *Oswald Tillotson, Ltd. v. I. R. Commissioners*, [1933] 1 K. B. 134. *Lever Brothers, Ltd. v. I. R. Commissioners*. [1938] 1 K. B. 314 ; [1937] 4 All E. R. 227.

APPENDICES

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APPENDIX A

TABLES OF REPEALS AND REPLACEMENTS.

Table I is a table of repeals and replacements of the Companies Act, 1929. In the left hand column the sections of the 1929 Act are set out, whilst the right hand column shows either the corresponding section or subsection of the Companies Act, 1948, or if the 1929 Act section has been repealed, the relevant section of the repealing Act. Table II similarly sets out the provisions of the Companies Act, 1947, in the left hand column and the corresponding sections of the 1948 Act in the right hand column. Table III contains miscellaneous Acts similarly dealt with and Table IV similarly sets out the First Schedule, Table A of the 1929 Act in comparison with the First Schedule, Table A, of the 1948 Act.

I

THE COMPANIES ACT, 1929

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
1	1	18 (1)	19 (1)
2	2	(2)	19 (3)
3	3	(3)	19 (1), (4)
4	4	(4)	19 (5)
5 (1)	5 (1)	(5)	19 (7)
5 (2)-(7)	Rep. 1947, s. 123, Sched. IX Pt. I.	19 (1)	18 (1)
6	6	(2)	18 (2)
7 (1)	7 (1)	(3)	19 (7)
(2)	7 (1), (2)	(4)	18 (3), 19 (7)
(3)	7 (3)	(5)	18 (4), 19 (7)
8	8	20	20
9	9	21	21
10	10	22	22
11	11	23	24
12	12	24	25
13	13	25	26
14	14	26	28
15	15	27 (1)	30 (1)
16	16	(2)	30 (3)
17	Rep. 1947, s. 123, Sched. IX, Pt. I.	(3)	29
		28	31
		29	32

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
30	33	54 (1)	65 (1). Sched. VIII
31	34	(2)	Rep. 1947, s. 123, Sched. IX, Pt. I
32	35		
33	36	55	66
34 (1)	37	56	67
(2)	41 (1)	57	68
(3)	41 (3)	58	69
(4)	41 (2)	59	70
(5)	41 (4)	60	71
35	38	61	72
36	42	62 (1)	73
37 (1)	43 (1), (2), 46	(2)	74
(2)	43 (4)	63	75
(3)	Rep. 1947, s. 123, Sched. IX, Pt. I	64	76
(4)	40 (3), 43 (5)	65	77
38	45	66	78
39	47	67	80
40 (1)	48 (1)	68	81
(2)	48 (3)	69	82
(3)	48 (4)	70	83
41	49	71	84
42	52	72	85
43	53	73 (1)	87 (1). (6)
44 (1)	Sched. VIII	(2)	87 (2)
(2)	Rep. 1947, s. 123, Sched. IX, Pt. I	(3)	87 (3)
45 (1)	54 (1)	(4)	87 (4)
(2)	Sched. VIII	(5)	87 (5)
(3)	54 (2)	74	89
46 (1)	58 (1)	75 (1)	90 (1)
(2)	Sched. VIII	(2)	90 (2)
(3)	58 (2)	(3)	Sched. VIII
(4)	58 (4)	(4)	90 (3)
(5)	58 (5)	(5)	90 (4)
47 (1)	57 (1)	(6)	91
(2)	57 (2)	76	92
(3)	57 (3), Sched. VIII	77	93
48	59	78 (1)	94 (1)
49	60	(2)	94 (3)
50	61	(3)	94 (5)
51	62	79	95
52	63	80	96
53	64	81	97
		82 (1)-(3)	98 (1)-(3)
		(4)	Rep. 1947, s. 123, Sched. IX, Pt. I

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
83	99	110 (3)	127 (1), (2), (4), 129 (1)
84	100	(4)	124 (3), 125 (3), 126 (2), 127 (3)
85	101	(5)	124 (4), 125 (4), 126 (2), 127 (3)
86	102 (1)-(3)	111	128
87	103	112 (1)	131 (1)
88	104	(2)	131 (5)
89	105	(3)	131 (2)
90	106	113	130
91	—	114	132
92	107	115 (1)	133 (1), (2), 134
93	108	(2)	135 (1), (2)
94	109	116	139
95 (1)	110 (1)	117 (1)-(3)	141 (1)-(3)
(2)	110 (4)	(4)	Rep. 1947, s. 123, Sched. IX, Pt. I
96 (1)	111 (1)	(5)	141 (4)
(2)	111 (2)	(6)	141 (5)
(3)	111 (4)	118	143
97	112	119	144
98 (1)	110 (2), 113 (1)	120	145 (1)-(3)
98 (2)-(4)	113 (2)-(4)	121	146
99	115	122 (1)	147 (1)
100	116	(2)	147 (3)
101	117	(3)	147 (4)
102	118	123 (1)	148 (1)
103	119	(2)	148 (2), 157 (1)
104	120	(3)	148 (3), 157 (3)
105	121	124	Sched. VIII
106	122	125	Sched. VIII
107 (1)	123 (1)	126	Rep. 1947, s. 123, Sched. IX, Pt. I
(2)	123 (2)	127	Rep. 1947, s. 123, Sched. IX, Pt. I
108 (1)	124 (1), Sched. VI	128 (1)	197 (1)
(2)	124 (1), Sched. VI	(2)	197 (2)
(3)	124 (1), Sched. VI	(3)	Rep. 1947, s. 123, Sched. IX, Pt. I
(4)	124 (1)	(4)	197 (3)
(5)	Rep. 1947, s. 123, Sched. IX, Pt. I	(5)	Rep. 1947, s. 123, Sched. IX, Pt. I
109 (1)	125 (1)	129 (1)	155 (1), 156 (1), 162 (2)
(2)	125 (2)		
110 (1)	126 (1)		
(2)	Rep. 1947, s. 123, Sched. IX, Pt. I		

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
	(2)	144 (1)	200 (1), (2)
	(3)	(2)	200 (4), (5)
130 (1)	155 (3), 156 (3)	(3)	200 (6)
(2)	158 (1), (2), (3)	(4)	200 (7)
131	158 (4)	(5)	200 (8)
132 (1)	433	(6)	200 (9)
(2)	159 (1)	145 (1)-(3)	201 (1)-(3)
(3)	Rep. 1947, s. 123, Sched. IX, Pt. I	(4)	200 (9), 201 (4)
(4)	Rep. 1947, s. 123, Sched. IX, Pt. I	146	202
(5)	159 (5)	147	203
(6)	159 (6)	148	Rep. 1947, s. 123, Sched. IX, Pt. I
	Rep. 1947, s. 123, Sched. IX, Pt. I	149	199
133 (1)	161 (2)	150 (1)	192 (1)
(2)	161 (5)	(2)	192 (2)
(3)	Rep. 1947, s. 123, Sched. IX, Pt. I	(3)	193 (1)
		(4)	193 (2), (3)
134 (1)	162 (1)	(4a)	193 (3), (4)
(2)	162 (3)	(4b)	193 (5)
(3)	Rep. 1947, s. 123, Sched. IX, Pt. I	(5)	194 (2)
		(6)	194 (4)
135 (1)	164 (1)	151	204
(2)	164 (2)	152	205
(3)	167 (1)	153 (1)-(4)	206 (1)-(4)
(4)	167 (2)	(5)	206 (6)
(5)	167 (3)	154	208
(6)	168 (1), (2)	155 (1)	209 (1)
136 (1)	169 (1)	(2)	209 (3)
(2)	169 (2)	(3)	209 (4)
(3)	Rep. 1947, s. 123, Sched. IX, Pt. I	(4)	209 (5)
(4)	Rep. 1947, s. 123, Sched. IX, Pt. I	156	211
137	Rep. 1947, s. 123, Sched. IX, Pt. I	157	212
138	171	158	213
139	176	159	214
140 (1)	181 (1)	160	215
(2)	181 (2)	161	216
(3)	181 (4)	162	217
(4)	181 (5)	163	218
141	182	164	Rep. 1947, s. 123, Sched. IX, Pt. I
142	187	165	219
143	180	166	220
		167	221
		168	222
		169	223

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
170	224	213	267
171 (1)	225 (1)	214	268
171 (2)	225 (3)	215	269
172	226	216	270
173	227	217	Rep. 1947, s. 123, Sched. IX, Pt. I
174	228		
175	229	218	271
176	230	219	272
177	231	220	273
178	232	221	274
179	233	222	275
180	234	223	276
181	235	224	277
182	236	225	278
183	237	226	279
184	238	227	280
185	239	228	281
186	240	229	282
187	241	230 (1)	283 (1)
188	242	(2)	283 (2)
189	243	(3)	283 (4)
190	244	231	284
191	245	232	285
192	246	233	286
193	247	234	287
194	248	235	289
195	249	236	290 (1)-(5)
196	250	237	292
197	251	238	293
198	252	239	294
199	253	240	295
200	254	241	296
201	255	242	297
202	256 (1), (2)	243	298
(2)	256 (2)	244	299
203	257	245	300 (1)-(5)
204	258	246	301
205	259	247	302
206	260	248	303
207	261	249	304
208	262	250	305
209	263	251	306
210	264	252	307 (1), (2)
211	265	253	308
212	266 (1)	254	309

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
255	310	277 (8)	Rep. 1947, s. 123, Sched. IX, Pt. I
256	311		335
257	312	278 (1), (2)	Rep. 1947, s. 123, Sched. IX, Pt. I
258	313	(3)	
259	314		
260	315	279	337
261	316	280	338
262	317	281	339
263	318	282	340
264 (1)	319 (1), (2)	283	341
(2)	319 (3)	284 (1)	342 (1)
(3)	319 (4)	(2)	Rep. 1947, s. 123, Sched. IX, Pt. I
(4)	319 (5)	(3)	342 (2)
(5)	319 (6)		343
(6)	319 (7)	285	344
(7)	319 (8)	286	345
265 (1)	320 (1)	287	346
(2)	320 (1)	288	347
(3)	320 (2)	289	348
(4)	320 (3)	290	349
266	322 (1)	291	350
267	323	292	351 (1), (2)
268	325	293	352
269 (1)	326 (1)	294	353
(2)	326 (2)	295	354
(3)	326 (4)	296	357
(4)	326 (5)	297	358 (1)
270	327	298	359
271	328	299	360
272	329	300	361
273	330	301	362 (1)-(4)
274	331	302	363
275 (1)-(3)	332 (1)-(3)	303	364
(4), (5)	Rep. 1947, s. 123, Sched. IX, Pt. I	304	365 (1)-(4)
(6)	332 (4)	305	366
(7)	332 (1)	306 (1)	366
276	333	(2)	Rep. 1947, s. 123, Sched. IX, Pt. I
277 (1)-(3)	334 (1)-(3)	(3)	
(4)	Rep. 1947, s. 123, Sched. IX, Pt. I	307	368
(5)	334 (4)	308	370
(6)	334 (5)	309	371 (1), (3)
(7)	334 (6)	310	374
		311	375
		312	424

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
313	425	349	412
314 (1)	426 (1), 427 (1)	350	413
(2)	426 (2)	351	414
(3)	426 (3)	352	415
(4)	426 (5)	353	416
315	428	354 (1)	417 (1), (3)
316	377		420 (1)
317	378	(2)	417 (5)
318	379	(3)	423 (1)
319	380	(4)	423 (2)
320	381	(5)	422
321	382	(6)	421
322	383	(7)	423 (3)
323	384	355 (1)	417 (1)
324	385	(2)	417 (2)
325	386	(3)	417 (4)
326	387	(4)	417 (6)
327	425 (1)	356	Rep. as from August 8, 1944, by the Prevention of Fraud (Investments) Act, 1939, s. 25 and S.R. & O., 1944, No. 864
328	389		
329	390		
330	391		
331	392		
332	393		
333	394		
334	395		
335	396	357	434 (1)
336	397	358	429
337	398	359	430
338 (1)	399 (1), (2), (3), (4), (5), (6), (7), (8), (9)	360	431
		361	432
(2)		362	438
(3)	400	363	Rep. by the False Oaths (Scotland) Act, 1933, s. 8, Sched.
	405		
339	401		
340	402		
341	403	364	439
342	404	353	440
343	406	366	442 (1)
344 (1)	407 (1), (2), (3)	367	444
(2)	407 (3)	368	445
(3)	407 (3)	369	446
345	408	370	437
346	409	371	447
347	410	372 (1)	448 (1)
348	411	(2)	448 (2)

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
372 (3)	448 (3)	Sched. IV,	Sched. IV,
(4)	448 (1)	Pt. I, 11	Pt. I, 12
373	449	Sched. IV,	Sched. IV,
374*	—	Pt. I, 12	Pt. I, 13
375	450	Sched. IV,	Sched. IV,
376	451	Pt. I, 13	Pt. I, 14
377	452	Sched. IV,	Sched. IV,
378	453	Pt. I, 14	Pt. I, 15
379 (1), (2)	454 (2)	Sched. IV,	Sched. IV,
380 (1)	455 (1)	Pt. I, 15	Pt. I, 16
(2)	455 (2)	Sched. IV,	Sched. IV,
381	—	Pt. I, 16	Pt. I, 17
382	—	Sched. IV,	Sched. IV,
383	460 (1)	Pt. I, 17	Pt. I, 18
384	461 (1)	Sched. IV,	Sched. IV,
385	—	Pt. II, 1	Pt. II, 19
Sched. I	Sched. I	Sched. IV,	Sched. IV,
Sched. II	Sched. II	Pt. II, 2	Pt. II, 20
Sched. III	Sched. III	Sched. IV,	Sched. IV,
Sched. IV	Rep. 1947, s. 123,	Pt. III, 1	Pt. III, 22
Pt. I	Sched. IX	Sched. IV,	Sched. IV,
Sched. IV	Sched. IV,	Pt. III, 2	Pt. III, 23
Pt. I, 2	Pt. I, 1	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 3	Pt. III, 24
Pt. I, 3	Pt. I, 2	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 4	Pt. III, 26
Pt. I, 4	Pt. I, 3	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 5	Pt. III, 27
Pt. I, 5	Pt. I, 4	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 6	Pt. III, 28
Pt. I, 6	Pt. I, 6	Sched. V	Sched. V
Sched. IV,	Sched. IV,	Sched. VI	Sched. VI
Pt. I, 7	Pt. I, 8	Sched. VII	Sched. XIII
Sched. IV,	Sched. IV,	Sched. VIII	206 (5),
Pt. I, 8	Pt. I, 9		Sched. X
Sched. IV,	Sched. IV,	Sched. IX	Sched. XI
Pt. I, 9	Pt. I, 10	Sched. X	Sched. XII
Sched. IV,	Sched. IV,	Sched. XI	Sched. XV
Pt. I, 10	Pt. I, 11	Sched. XII	—

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Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
1 (1)	131 (1)	14	150
(2)	131 (2)	15	151
(3)	131 (3)	16	152
(4)	131 (4), (5)	17	153
(5)	131 (5)	18	154
2 (1)	133 (1), (2)	19	157 (2)
(2)	133 (3)	20	147 (4), 148 (3), 149 (6), 150 (3), 157 (3)
(3)	141 (2), (4)		
(4)	130 (2), 158 (1), 159 (5)	21 (1)	156 (1), (2)
(5)	130 (2), 158 (1)	(2)	156 (3)
(6)	142	(3)	158 (1)
3	140	(4)	158 (1), (4)
4 (1)	137 (1)	22 (1)	162 (1), 488, Sched. XV
(2)	137 (2)	(2)	162 (3), (4)
(3)	—	23	161 (1)–(4)
5 (1)–(4)	136 (1)–(4)	24 (1)	159 (1), (2), (3)
(5)	138, 141 (4)	(2)	159 (4)
(6)	136 (5), 138	(3)	160 (1)
6	131 (2), 135 (1)	(4)	160 (2)
7	143 (1)	(5)	160 (3)
8	145 (4)	(6)	159 (2)
9	210	(7)	159 (5), 160 (4)
10	72 (2)	(8)	159 (7), Sched. VIII
11 (1)	209 (1)	25	163
(2)	209 (1)	26 (1)	176, 177 (1), 178
(3)	209 (2)	(2)	235 (2)
(4)	209 (2)	(3)	177 (2)
(5)	209 (3)	(4)	179
(6)	209 (6)	27 (1)	125 (1), 200 (1), (3), (4), (7), Sched. VI
12 (1)	147 (2)		
(2)	147 (3)	(2)	200 (3)
13 (1)	149 (1)	(3)	200 (5)
13 (2)	149 (2)	(4)	200 (4)
(3)	149 (3)	(5)	—
(4)	149 (4)	(6)	200 (2)
(5)	149 (5)	(7)	200 (2), (9)
(6)	149 (6)		
(7)	157 (1)		
(8)	147 (3), 149 (7)		

Section of 1929 Act	Corresponding Section of 1948 Act	Section of 1929 Act	Corresponding Section of 1948 Act
372 (3)	448 (3)	Sched. IV,	Sched. IV,
(4)	448 (1)	Pt. I, 11	Pt. I, 12
373	449	Sched. IV,	Sched. IV,
374*	—	Pt. I, 12	Pt. I, 13
375	450	Sched. IV,	Sched. IV,
376	451	Pt. I, 13	Pt. I, 14
377	452	Sched. IV,	Sched. IV,
378	453	Pt. I, 14	Pt. I, 15
379 (1), (2)	454 (2)	Sched. IV,	Sched. IV,
380 (1)	455 (1)	Pt. I, 15	Pt. I, 16
(2)	455 (2)	Sched. IV,	Sched. IV,
381	—	Pt. I, 16	Pt. I, 17
382	—	Sched. IV,	Sched. IV,
383	460 (1)	Pt. I, 17	Pt. I, 18
384	461 (1)	Sched. IV,	Sched. IV,
385	—	Pt. II, 1	Pt. II, 19
Sched. I	Sched. I	Sched. IV,	Sched. IV,
Sched. II	Sched. II	Pt. II, 2	Pt. II, 20
Sched. III	Sched. III	Sched. IV,	Sched. IV,
Sched. IV	Rep. 1947, s. 123,	Pt. III, 1	Pt. III, 22
Pt. I	Sched. IX	Sched. IV,	Sched. IV,
Sched. IV	Sched. IV,	Pt. III, 2	Pt. III, 23
Pt. I, 2	Pt. I, 1	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 3	Pt. III, 24
Pt. I, 3	Pt. I, 2	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 4	Pt. III, 26
Pt. I, 4	Pt. I, 3	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 5	Pt. III, 27
Pt. I, 5	Pt. I, 4	Sched. IV,	Sched. IV,
Sched. IV,	Sched. IV,	Pt. III, 6	Pt. III, 28
Pt. I, 6	Pt. I, 6	Sched. V	Sched. V
Sched. IV,	Sched. IV,	Sched. VI	Sched. VI
Pt. I, 7	Pt. I, 8	Sched. VII	Sched. XIII
Sched. IV,	Sched. IV,	Sched. VIII	206 (5),
Pt. I, 8	Pt. I, 9		Sched. X
Sched. IV,	Sched. IV,	Sched. IX	Sched. XI
Pt. I, 9	Pt. I, 10	Sched. X	Sched. XII
Sched. IV,	Sched. IV,	Sched. XI	Sched. XV
Pt. I, 10	Pt. I, 11	Sched. XII	—

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Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
1 (1)	131 (1)	14	150
(2)	131 (2)	15	151
(3)	131 (3)	16	152
(4)	131 (4), (5)	17	153
(5)	131 (5)	18	154
2 (1)	133 (1), (2)	19	157 (2)
(2)	133 (3)	20	147 (4), 148 (3), 149 (6), 150 (3), 157 (3)
(3)	141 (2), (4)	21 (1)	156 (1), (2)
(4)	130 (2), 158 (1), 159 (5)	(2)	156 (3)
(5)	130 (2), 158 (1)	(3)	158 (1)
(6)	142	(4)	158 (1), (4)
3	140	22 (1)	162 (1), 438, Sched. XV
4 (1)	137 (1)	(2)	162 (3), (4)
(2)	137 (2)	23	161 (1)-(4)
(3)	—	24 (1)	159 (1), (2), (3)
5 (1)-(4)	136 (1)-(4)	(2)	159 (4)
(5)	138, 141 (4)	(3)	160 (1)
(6)	136 (5), 138	(4)	160 (2)
6	131 (2), 135 (1)	(5)	160 (3)
7	143 (1)	(6)	159 (2)
8	145 (4)	(7)	159 (5), 160 (4)
9	210	(8)	159 (7), Sched. VIII
10	72 (2)	25	163
11 (1)	209 (1)	26 (1)	176, 177 (1), 178
(2)	209 (1)	(2)	235 (2)
(3)	209 (2)	(3)	177 (2)
(4)	209 (2)	(4)	179
(5)	209 (3)	27 (1)	125 (1), 200 (1), (3), (4), (7), Sched. VI
(6)	209 (6)	(2)	200 (3)
12 (1)	147 (2)	(3)	200 (5)
(2)	147 (3)	(4)	200 (4)
13 (1)	149 (1)	(5)	—
13 (2)	149 (2)	(6)	200 (2)
(3)	149 (3)	(7)	200 (2), (9)
(4)	149 (4)		
(5)	149 (5)		
(6)	149 (6)		
(7)	157 (1)		
(8)	147 (3), 149 (7)		

Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
27 (8)	200 (9)	43 (2)	166, 167 (1), (2), (3), (4), (5), 168 (1), (2), 169 (1), (2), 171
28	183		168 (2)
29	184	(3)	—
30	185	(4)	—
31	186	44 (1)	169 (3)
32	181 (3)	(2)	169 (4)
33	188	(3)	169 (5)
34	189	(4)	—
35	190	45	170
36 (1)	191	46	172
(2)	193 (1)	47	173
(3)	193 (3)	48	174
(4)	193 (3), (4), (5)	49	175
(5)	193 (3)	50 (1)	110 (2)
(6)	194 (1)	(2)	111 (3), 120 (3)
(7)	194 (3)	(3)	110 (3)
37	195	(4)	110 (4), 111 (4), 120 (7)
38 (1)-(9)	196	(5)	114, 120 (7)
(10)	—	51	110 (1)
39 (1)	197 (1)	52 (1)	124 (1), 125 (1)
(2)	197 (1), (2)	(2)	124 (1), 126 (1), Sched. VI
(3)	197 (4)	(3)	—
40 (1)	207 (1)	53 (1)	125 (1), Sched. VI
(2)	207 (2)	(2)	127 (1), (2)
(3)	207 (3)	(3)	124 (1)
(4)	207 (4)	(4)	124 (2)
(5)	206 (6)	(5)	124 (1)
41 (1)	198 (1), 207 (5)	(6)	Sched. VI
(2)	198 (2)	54	129
(3)	198 (3), 207 (5)	55 (1)	126 (1), 127 (1), 128
(4)	198 (4), 207 (5)	(2)	438, Sched. XV
(5)	199 (3)	56	107 (1), (2)
42 (1)	164 (1), (2)	57	108 (1), (4)
(2)	167 (1)	58	Still in force
(3)	167 (5)	59	50 (1)-(6)
(4)	167 (4)	60 (1)-(4)	51 (1)-(4)
(5)	166	(5)	109 (1)
(6)	167 (1), (2), (3), (5), 169 (1), (2)		
(7)	168 (2)		
(8)	168 (1), (2)		
	169 (1), 171		
43 (1)	165		

Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
60 (6)	51 (5)	67 (2)	30 (1), 48 (1), Scheds. III, V
(7)	51 (6)	(3)	30 (2), 48 (2)
61 (1)	Sched. IV, Pt. I, 5, 7, 9, 12, 13, 14, Pt. III, 25	(4)	Scheds. III, V
(2)	Sched. IV, Pt. I, 9, 10	(5)	30 (4), 48 (5)
(3)	—	(6)	30 (3), 48 (4)
(4)	Sched. IV, Pt. III, 22, 23, 24, 26	(7)	438, Sched. XV
62 (1)	Sched. IV, Pt. II, 19, 20	68 (1)	55 (1)
(2)	Sched. IV, Pt. II, 19, 20, Pt. III, 27	(2)	55 (2)
(3)	Sched. IV, Pt. II, 19, 20	(3)	30 (5), 46, 48 (6)
(4)	Sched. IV, Pt. II, 19	(4)	30 (5), 40 (3), 46, 48 (6)
(5)	Sched. IV, Pt. II, 21	69 (1)	74
(6)	Sched. IV, Pt. III, 30	(2)	110 (1), 112 (1)
(7)	Sched. IV, Pt. III, 29	70	79
63 (1)	40 (1), (2)	71 (1)	58 (1)
(2)	41 (1)	(2)	58 (3)
(3)	41 (1)	(3)	Scheds. III, V, VIII
(4)	41 (2), (3)	(4)	58 (5)
(5)	41 (4)	72 (1)	56 (1)
(6)	426 (1)	(2)	Sched. VIII
64 (1)	38 (5)	(3)	56 (2)
(2)	39 (1)	(4)	58 (1)
(3)	39 (2), 50 (7)	(5)	56 (3)
(4)	41 (1), (2), (3), (4), 426 (1)	73	54 (1)
65 (1)	43 (1), (2), (3), (4)	74 (1)	86 (1), (2), (3), 125 (1), Sched. VI
(2)	43 (4)	(2)	87 (1), (2)
(3)	43 (2)	75	88
(4)	—	76 (1)	5 (1), (10)
66	44	(2)	5 (1)
67 (1)	30 (1)	(3)	5 (2)
		(4)	5 (3)
		(5)	5 (4)
		(6)	5 (5)
		(7)	5 (6), 19 (6)
		(8)	5 (7)
		(9)	5 (8)
		(10)	5 (9), (10)
		77 (1)	23 (1)
		(2)	23 (2)
		(3)	23 (1), (3)

Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
77 (4)	23 (1)	91 (6)	319 (8), 358 (2)
(5)	23 (4)	(7)	319 (8)
78 (1)	17	(8)	94 (1), (2), (4), 319 (9), 358 (3)
(2)	18 (2)	92 (1)	320 (1), (3)
(3)	388	(2)	321 (1)
(4)	—	(3)	321 (2)
79 (1)	19 (2), 389	(4)	321 (3)
(2)	19 (2), (3), (4), (5), (7)	93 (1)	322 (1)
80	27	(2)	322 (1)
81 (1)	7 (1), (2), Sched. XII	94 (1)	283 (1), (2)
(2)	7 (3), 425 (1), Sched. XII	(2)	283 (3)
(3)	425 (1), Sched. XII	(3)	288 (1), (2)
82 (1)	32 (4)	(4)	291
(2)	427 (3)	(5)	283 (5), 288 (1)
83	367	95 (1)	289 (1), 299 (1)
84 (1)-(5)	372 (1)-(5)	(2)	290 (6), 300 (6)
(6)	372 (6), 374 (1)	(3)	253 (7), 295 (2)
(7)	372 (7), 438, Sched. XV	(4)	303 (1), 315 (1)
85 (1)-(5)	373 (1)-(5)	96 (1)	—
(6)	426 (1)	(2)	29
(7)	426 (4)	(3)	274 (1)
(8)	373 (6), 426 (1)	(4)	325 (1), 326 (3)
86 (1)	375 (1), (2), (3)	97 (1)	256 (3), 307 (3), 460 (2)
(2)	375 (1)	(2)	274 (2)
87 (1)	369 (1)	(3)	279 (1), 305 (1)
(2)	369 (2)	(4)	249 (4)
(3)	371 (2)	97 (5)	249 (5)
(4)	369 (3), 371 (4)	(6)	—
88	376	(7)	266 (2)
89 (1)	95 (2), 458 (1)	98	343 (1)
(2)	—	99	460 (1)
(3)	100	(1)	324 (1), 356 (1)
(4)	—	(2)	324 (2), 356 (1)
90	225 (2)	(3)	324 (3), 356 (1)
91 (1)	319 (1), (2)	(4)	356 (2)
(2)	319 (1)	100	355
(3)	358 (1)	101 (1)	332 (1), (2), (3)
(4)	319 (8), 358 (2)	(2)	332 (3)
(5)	319 (1), (4), 358 (1), (2)	(3)	331 (1), 458 (2)
		(4)	—
		(5)	336, 460 (1)
		102	441
		103 (1)	443 (1), (9)

Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
103 (2)-(8)	443 (2)-(8)	113 (2)	407 (2)
(9)	443 (10)	114	411
104 (1) •	442 (1), (4)	115	Still in force
(2)	442 (2)	116	Still in force
(3)	442 (3)	117	Still in force
(4)	442 (4)	118 (1)	456, Sched. XVI
105 (1)	52 (3), 78 (2), 80 (2), 96 (3), 105 (2), 131 (5), 155 (3), 156 (3), 158 (3), 331 (1), 433 (4)	118 (2)	456, 457, Sched. XVI
(2)	130 (9)	(3)	456, Sched. XVI
(3)	201 (3), (4)	119	436
(4)	48 (4), 338 (2), 370 (2), 414	120 (1)	454 (1)
106	—	(2)	454 (2)
107 (1)	377, 378, 379, 380, 381, 394 (3), (6)	(3)	65 (1), 322 (1), 362 (4), 459 (2)
(2)	395 (2)	121 (1)	454 (3)
(3)	399 (1)	(2)-(4)*	—
108	435 (1)-(4)	122 (1)	455 (1), 456
109 (1)	427 (1), (2)	(2)	455 (1)
(2)	—	(3)	455 (4)
110 (1)	417 (1), (3), 419 (1), 421, 422	(4)	71, 104 (2), 108 (4), 161 (2), 162 (3), 197 (1), 205, 235 (2), 236 (2), 269, 270 (1), 328 (1), (3), 329, 330, 334 (1), (2), (4), 338 (2), 353 (7), 370 (2), 440 (2), 448 (1), 450 (2), 455 (1)
(2)	420 (1)	(5)	455 (1)
(3)	426 (1)	(6)	455 (3)
(4)	420 (2)	(7)	1 (1), 15 (1), 234, 399 (1), 416, 425 (2), 428 (1), 440 (1), (2), 442 (1), 444, 445, 449, 450 (1), 451, 452, 453 (1), 461 (1), Sched. XII
(5)	417 (5), 418 (1), (2), 420 (1), (2)		—
(6)	419 (1), 420 (1), 422		
(7)	419 (2), 423 (1), (3)		
111	408		
112 (1)	410 (1), (2)		
(2)	410 (1)		
(3)	438, Sched. XV		
113 (1)	407 (1), (2), 409, 415	123	—

*See now The Statutory Instruments Act, 1946, sections 1 (2) and 4 (3), as to laying of regulations.

Section of 1947 Act	Corresponding Section of 1948 Act	Section of 1947 Act	Corresponding Section of 1948 Act
Sched. I	Sched. VIII	(f)	161 (2), 197 (1), 270 (1), 353 (7)
Sched. II	Sched. IX	(g)	270 (1)
Sched. III	Sched. VII	(h)	235 (2)
Sched. IV	Scheds. III, V	(i)	162 (3)
Sched. V	52 (3), 78 (2), 80 (2), 96 (3), 105 (2), 131 (5), 155 (3), 156 (3), 158 (3), 331 (1), 433 (4)	(j)	448 (1)
Sched. VI	Sched. XIV	2	328 (3)
Sched. VIII		Sched. VIII	1 (1), 15 (1), 234, 399 (1), 416, 425 (2), 428 (1), 440 (1), (2), 442 (1), 444, 445, 499.
(a)	71, 338 (2), 370 (2), 440 (2)	Sched. VIII	450 (1), 451, 452, 453 (1), 461 (1), Scheds. VIII, XII
(b)	104 (2), 328 (1), 329, 330, 334 (1), (2), (4)	Sched. IX	—
(c)	108 (4), 205		
(d)	205, 450 (2)		
(e)	236 (2), 269, 270 (1)		

III

MISCELLANEOUS ENACTMENTS

Short title and section of Act replaced	Corresponding section of 1948 Act
Workmen's Compensation (Coal Mines) Act, 1934, s. 3 (6)	94 (1), 319 (1)
Unemployment Insurance Act, 1935, s. 20 (1)	94 (1), 319 (1), 358 (1)
National Health Insurance Act, 1936, s. 177 (1)	94 (1), 319 (1), 358 (1)
Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 13 (1)	94 (1), 319 (1), 358 (1)
Finance Act, 1937, Sched. V, Pt. III, 5	94 (1), 319 (1)
War Risks Insurance Act, 1939, s. 5	434 (2)
Finance (No. 2) Act, 1939, s. 21 (2)	94 (1), 319 (1)
Finance Act, 1942, s. 20 (2)	319 (1)
(3)	94 (1)
Reinstatement in Civil Employment Act, 1944, s. 18 (2)	319 (1)
(3)	94 (1)
(4)	94 (1), 319 (1), (2)
National Insurance (Industrial Injuries) Act, 1946, s. 71 (1)	94 (1), 319 (1), 358 (1)
National Insurance Act, 1946, s. 55 (1)	94 (1), 319 (1), 358 (1)

IV

THE COMPANIES ACT, 1929

FIRST SCHEDULE, TABLE A

Clauses of 1929 Act, Table A *	Corresponding Clauses of 1948 Act, Table A	Clauses of 1929 Act, Table A	Corresponding Clauses of 1948 Act, Table A
1	1	35	—
2	{ 2	36	—
3	3	37	45
4	4	38	46
5	8	39	47
6	9	40	48
7	10	41	49
8	11	42	50
9	12	43	51
10	13	44	52
11	14	45	53
12	15	46	54
13	17	47	55
14	18	48	56
15	19	49	57
16	20	50	58
17	21	51	59
18	22	52	60
	23	53	61
	{ 24	54	62
19	25	55	63
	26	56	64
	27	57	65
20	29	58	67
21	30	59	68
22	32	60	69
23	33	61	70
24	34	62	72
25	35	63	74
26	36	64	75
27	37	65	76
28	38	66	77
29	39	67	80
30	40	68	107
31	41	69	79
32	42	70	86
33	43	71	113
34	44	72	88

Clauses of 1929 Act, Table A	Corresponding Clauses of 1948 Act, Table A	Clauses of 1929 Act, Table A	Corresponding Clauses of 1948 Act, Table A
73	89	91	
74	90	92	116
75	91	93	118
76	92	94	117
77	94	95	121
78 } 79 }	95	96	122
80	96	97	123
81	98	98	124
82	99	99	125
83	100	100	126
84	101	101	127
85	102	102	130
86	103	103	
87	104	104	131
88	105	105	
89	114	106	132
90	115	107	133
			134

APPENDIX B

COMPANIES ACT, 1948, FIRST SCHEDULE
TABLE A

PART I

REGULATIONS FOR MANAGEMENT OF A COMPANY
LIMITED BY SHARES, NOT BEING A PRIVATE COMPANY

Interpretation

1. In these regulations :—

“ the Act ” means the Companies Act, 1948.

“ the seal ” means the common seal of the company.

“ secretary ” means any person appointed to perform the duties of the secretary of the company.

“ the United Kingdom ” means Great Britain and Northern Ireland.

Expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

Unless the context otherwise requires, words or expressions contained in these regulations shall bear the same meaning as in the Act or any statutory modification thereof in force at the date at which these regulations become binding on the company.

Share Capital and Variation of Rights

2. Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares, any share in the company may be issued with such preferred, deferred or other special rights or such restrictions, whether in regard to dividend, voting, return of capital or otherwise as the company may from time to time by ordinary resolution determine.

3. Subject to the provisions of section 58 of the Act, any preference shares may, with the sanction of an ordinary resolution, be issued on the terms that they are, or at the option of the company are liable, to be redeemed on such terms and in such manner as the company before the issue of the shares may by special resolution determine.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may, whether or not the company is being wound up, be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class and that any holder of shares of the class present in person or by proxy may demand a poll.

5. The rights conferred upon the holders of the shares of any class issued with preferred or other rights shall not, unless otherwise expressly provided by the terms of issue of the shares of that class, be deemed to be varied by the creation or issue of further shares ranking *pari passu* therewith.

6. The company may exercise the powers of paying commissions conferred by section 53 of the Act, provided that the rate per cent. or the amount of the commission paid or agreed to be paid shall be disclosed in the manner required by the said section and the rate of the commission shall not exceed the rate of 10 per cent. of the price at which the shares in respect whereof the same is paid are issued or an amount equal to 10 per cent. of such price (as the case may be). Such commission may be satisfied by the payment of cash or the allotment of fully or partly paid shares or partly in one way and partly in the other. The company may also on any issue of shares pay such brokerage as may be lawful.

7. Except as required by law, no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by these regulations or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder.

8. Every person whose name is entered as a member in the register of members shall be entitled without payment to receive within two months after allotment or lodgment of transfer (or within such other period as the conditions of issue shall provide) one certificate for all his shares or several certificates each for one or more of his shares upon payment of 2s. 6d. for every certificate after the first or such less sum as the directors shall from time to time determine. Every certificate shall be under the seal and shall specify the shares to which it relates and the amount paid up thereon. Provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all such holders.

9. If a share certificate be defaced, lost or destroyed it may be renewed on payment of a fee of 2s. 6d. or such less sum and on such terms (if any) as to evidence and indemnity and the payment of out-of-pocket expenses of the company of investigating evidence as the directors think fit.

10. The company shall not give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person or for any shares in the company or in its holding company nor shall the company make a loan for any purpose whatsoever on the security of its shares or those of its holding company, but nothing in this regulation shall prohibit transactions mentioned in the proviso to section 54 (1) of the Act.

Lien

11. The company shall have a first and paramount lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a first and paramount lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien, if any, on a share shall extend to all dividends payable thereon.

12. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless a sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled thereto by reason of his death or bankruptcy.

13. To give effect to any such sale the directors may authorise some person to transfer the shares sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

14. The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue, if any, shall (subject to a like lien for sums not presently payable as existed upon the shares before the sale) be paid to the person entitled to the shares at the date of the sale.

Calls on Shares

15. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares (whether on account of the nominal value of the shares or by way of premium) and not by the conditions of allotment thereof made payable at fixed times, provided that no call shall exceed one-fourth of the nominal value or the share or be payable at less than one month from the date fixed for the payment of the last preceding call, and each member shall (subject to receiving at least fourteen day's notice specifying the time or times and place of payment) pay to the company at the time or times and place so specified the amount called on his shares. A call may be revoked or postponed as the directors may determine.

16. A call shall be deemed to have been made at the time when the resolution of the directors authorising the call was passed and may be required to be paid by instalments.

17. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

18. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest on the sum from the day appointed for payment thereof to the time of actual payment at such rate not exceeding 5 per cent. per annum as the directors may determine, but the directors shall be at liberty to waive payment of such interest wholly or in part.

19. Any sum which by the terms of issue of a share becomes payable on allotment or at any fixed date, whether on account of the nominal value of the share or by way of premium, shall for the purposes of these regulations be deemed to be a call duly made and payable on the date on which by the terms of issue the same becomes payable, and in case of non-payment all the relevant provisions of these regulations as to payment of interest and expenses, forfeiture or otherwise shall apply as if such sum had become payable by virtue of a call duly made and notified.

20. The directors may, on the issue of shares, differentiate between the holders as to the amount of calls to be paid and the times of payment.

21. The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys uncalled and unpaid upon any shares held by him, and upon all or any of the moneys so advanced may (until the same would, but for such advance, become payable) pay interest at such rate not exceeding (unless the company in general meeting shall otherwise direct) 5 per cent. per annum, as may be agreed upon between the directors and the member paying such sum in advance.

Transfer of Shares

22. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and, except as provided by sub-paragraph (4) of paragraph 2 of the Seventh Schedule to the Act, the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

23. Subject to such of the restrictions of these regulations as may be applicable, any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.

24. The directors may decline to register the transfer of a share (not being a fully paid share) to a person of whom they shall not approve, and they may also decline to register the transfer of a share on which the company has a lien.

25. The directors may also decline to recognise any instrument of transfer unless :—

- (a) a fee of 2s. 6d. or such lesser sum as the directors may from time to time require is paid to the company in respect thereof ;
- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer ; and
- (c) the instrument of transfer is in respect of only one class of share.

26. If the directors refuse to register a transfer they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

27. The registration of transfers may be suspended at such times and for such periods as the directors may from time to time determine, provided always that such registration shall not be suspended for more than thirty days in any year.

28. The company shall be entitled to charge a fee not exceeding 2s. 6d. on the registration of every probate, letters of administration, certificate of death or marriage, power of attorney, notice in lieu of distringas, or other instrument.

Transmission of Shares

29. In case of the death of a member the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares ; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any

share which had been jointly held by him with other persons.

30. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy, as the case may be.

31. If the person so becoming entitled shall elect to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects. If he shall elect to have another person registered he shall testify his election by executing to that person a transfer of the share. All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.

32. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company :

Provided always that the directors may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within ninety days the directors may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share until the requirements of the notice have been complied with.

Forfeiture of Shares

33. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part

of the call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

34. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of service of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

35. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

36. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

37. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were payable by him to the company in respect of the shares, but his liability shall cease if and when the company shall have received payment in full of all such moneys in respect of the shares.

38. A statutory declaration in writing that the declarant is a director or the secretary of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

39. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the nominal value of the share or by way of premium, as if the same had been payable by virtue of a call made and notified.

Conversion of Shares into Stock

40. The company may by ordinary resolution convert any paid-up shares into stock, and reconvert any stock into paid-up shares of any denomination.

41. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as and subject to which the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; and the directors may from time to time fix the minimum amount of stock transferable but so that such minimum shall not exceed the nominal amount of the shares from which the stock arose.

42. The holders of stock shall, according to the amount of stock held by them, have the same rights, privileges and advantages as regards dividends, voting at meetings of the company and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company and in the assets on winding up) shall be conferred by an amount of stock which would not, if existing in shares, have conferred that privilege or advantage.

43. Such of the regulations of the company as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

Alteration of Capital

44. The company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

45. The company may by ordinary resolution—

- (a) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

- (b) sub-divide its existing shares, or any of them, into shares of smaller amount than is fixed by the memorandum of association subject, nevertheless, to the provisions of section 61 (1) (d) of the Act ;
- (c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

46. The company may by special resolution reduce its share capital, any capital redemption reserve fund or any share premium account in any manner and with, and subject to, any incident authorised, and consent required, by law.

General Meetings

47. The company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year, and shall specify the meeting as such in the notices calling it ; and not more than fifteen months shall elapse between the date of one annual general meeting of the company and that of the next. Provided that so long as the company holds its first annual general meeting within eighteen months of its incorporation, it need not hold it in the year of its incorporation or in the following year. The annual general meeting shall be held at such time and place as the directors shall appoint.

48. All general meetings other than annual general meetings shall be called extraordinary general meetings.

49. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by section 132 of the Act. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Notice of General Meetings

50. An annual general meeting and a meeting called for the passing of a special resolution shall be called by twenty-one days' notice in writing at the least, and a meeting of the company other than an annual general meeting or a

meeting for the passing of a special resolution shall be called by fourteen days' notice in writing at the least. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given, and shall specify the place, the day and the hour of meeting and, in case of special business, the general nature of that business, and shall be given, in manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company :

Provided that a meeting of the company shall, notwithstanding that it is called by shorter notice than that specified in this regulation, be deemed to have been duly called if it is so agreed—

- (a) in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat ; and
- (b) in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 95 per cent. in nominal value of the shares giving that right.

51. The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting.

Proceedings at General Meetings

52. All business shall be deemed special that is transacted at an extraordinary general meeting, and also all that is transacted at an annual general meeting, with the exception of declaring a dividend, the consideration of the accounts, balance sheets, and the reports of the directors and auditors, the election of directors in the place of those retiring and the appointment of, and the fixing of the remuneration of, the auditors.

53. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business ; save as herein otherwise provided, three members present in person shall be a quorum.

54. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved ; in any other case it shall stand adjourned to the same day in the next week, at the same time and place or to such other day and at such other time and place as the directors may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

55. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company, or if there is no such chairman, or if he shall not be present within fifteen minutes after the time appointed for the holding of the meeting or is unwilling to act the directors present shall elect one of their number to be chairman of the meeting.

56. If at any meeting no director is willing to act as chairman or if no director is present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman of the meeting.

57. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for thirty days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

58. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded—

- (a) by the chairman ; or
- (b) by at least three members present in person or by proxy ; or
- (c) by any member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting ; or

- (d) by a member or members holding shares in the company conferring a right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

Unless a poll be so demanded a declaration by the chairman that a resolution has on a show of hands been carried or carried unanimously, or by a particular majority, or lost and an entry to that effect in the book containing the minutes of the proceedings of the company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

The demand for a poll may be withdrawn.

59. Except as provided in regulation 61, if a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

60. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

61. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs, and any business other than that upon which a poll has been demanded may be proceeded with pending the taking of the poll.

Votes of Members

62. Subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person shall have one vote, and on a poll every member shall have one vote for each share of which he is the holder.

63. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

64. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, receiver, curator bonis, or other person in the nature of a committee, receiver or curator bonis appointed by that court, and any such committee, receiver, curator bonis or other person may, on a poll, vote by proxy.

65. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

66. No objection shall be raised to the qualification of any voter except at the meeting or adjourned meeting at which the vote objected to is given or tendered, and every vote not disallowed at such meeting shall be valid for all purposes. Any such objection made in due time shall be referred to the chairman of the meeting, whose decision shall be final and conclusive.

67. On a poll, votes may be given either personally or by proxy.

68. The instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing, or, if the appointer is a corporation, either under seal, or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company.

69. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company or at such other place within the United Kingdom as is specified for that purpose in the notice convening the meeting, not less than 48 hours before the time for holding the meeting or adjourned meeting, at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 24 hours before the time appointed for the taking of the poll, and in default the instrument of proxy shall not be treated as valid.

70. An instrument appointing a proxy shall be in the following form or a form as near thereto as circumstances admit—

“
I/We _____, Limited
_____ of _____, in
the county of _____ being a member/
members of the above-named company, hereby appoint

of
or failing him, of
as my/our proxy to vote for me/us on my/our behalf at the
[annual or extraordinary, as the case may be] general
meeting of the company to be held on the day of
19 , and at any adjournment thereof.

Signed this day of 19 .”

71. Where it is desired to afford members an opportunity of voting for or against a resolution the instrument appointing a proxy shall be in the following form or a form as near thereto as circumstances admit—

“ Limited
I/We, , of
in the county of , being a member/members of
the above-named company, hereby appoint
of , or failing him
of , as my/our proxy to vote for
me/us on my/our behalf at the [annual or extraordinary, as
the case may be] general meeting of the company, to be
held on the day of 19 ,
and at any adjournment thereof.

Signed this day of 19 .

This form is to be used * in favour of the resolution. Un-
against

less otherwise instructed, the proxy will vote as he thinks fit.

* Strike out whichever is not desired.”

72. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

73. A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death or insanity of the principal or revocation of the proxy or of the authority under which the proxy was executed, or the transfer of the share in respect of which the proxy is given, provided that no intimation in writing of such death, insanity, revocation or transfer as aforesaid shall have been received by the company at the office before the commencement of the meeting or adjourned meeting at which the proxy is used.

Corporations acting by Representatives at Meetings

74. Any corporation which is a member of the company may by resolution of its directors or other governing body

authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of members of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual member of the company.

Directors

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75. The number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them.

76. The remuneration of the directors shall from time to time be determined by the company in general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

77. The shareholding qualification for directors may be fixed by the company in general meeting, and unless and until so fixed no qualification shall be required.

78. A director of the company may be or become a director or other officer of, or otherwise interested in, any company promoted by the company or in which the company may be interested as shareholder or otherwise, and no such director shall be accountable to the company for any remuneration or other benefits received by him as a director or officer of, or from his interest in, such other company unless the company otherwise direct.

Borrowing Powers

79. The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital or any part thereof, and to issue debentures, debenture stock, and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party :

Provided that the amount for the time being remaining undischarged of moneys borrowed or secured by the directors as aforesaid (apart from temporary loans obtained

from the company's bankers in the ordinary course of business) shall not at any time, without the previous sanction of the company in general meeting, exceed the nominal amount of the share capital of the company for the time being issued, but nevertheless no lender or other person dealing with the company shall be concerned to see or inquire whether this limit is observed. No debt incurred or security given in excess of such limit shall be invalid or ineffectual except in the case of express notice to the lender or the recipient of the security at the time when the debt was incurred or security given that the limit hereby imposed had been or was thereby exceeded.

Powers and Duties of Directors

80. The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

81. The directors may from time to time and at any time by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these regulations) and for such period and subject to such conditions as they may think fit, and any such powers of attorney may contain such provisions for the protection and convenience of persons dealing with any such attorney as the directors may think fit and may also authorise any such attorney to delegate all or any of the powers, authorities and discretions vested in him.

82. The company may exercise the powers conferred by section 35 of the Act with regard to having an official seal for use abroad, and such powers shall be vested in the directors.

83. The company may exercise the powers conferred upon the company by sections 119 to 123 (both inclusive) of the Act with regard to the keeping of a dominion register, and the directors may (subject to the provisions of those sections) make and vary such regulations as they may think fit respecting the keeping of any such register.

84.—(1) A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 199 of the Act.

(2) A director shall not vote in respect of any contract or arrangement in which he is interested, and if he shall do so his vote shall not be counted, nor shall he be counted in the quorum present at the meeting, but neither of these prohibitions shall apply to—

- (a) any arrangement for giving any director any security or indemnity in respect of money lent by him to or obligations undertaken by him for the benefit of the company ; or
- (b) to any arrangement for the giving by the company of any security to a third party in respect of a debt or obligation of the company for which the director himself has assumed responsibility in whole or in part under a guarantee or indemnity or by the deposit of a security ; or
- (c) any contract by a director to subscribe for or underwrite shares or debentures of the company ; or
- (d) any contract or arrangement with any other company in which he is interested only as an officer of the company or as holder of shares or other securities ;

and these prohibitions may at any time be suspended or relaxed to any extent, and either generally or in respect of any particular contract, arrangement or transaction, by the company in general meeting.

(3) A director may hold any other office or place of profit under the company (other than the office of auditor) in conjunction with his office of director for such period and on such terms (as to remuneration and otherwise) as the directors may determine and no director or intending director shall be disqualified by his office from contracting with the company either with regard to his tenure of any

such other office or place of profit or as vendor, purchaser or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the company in which any director is in any way interested, be liable to be avoided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realised by any such contract or arrangement by reason of such director holding that office or of the fiduciary relation thereby established.

(4) A director, notwithstanding his interest, may be counted in the quorum present at any meeting whereat he or any other director is appointed to hold any such office or place of profit under the company or whereat the terms of any such appointment are arranged and he may vote on any such appointment or arrangement other than his own appointment or the arrangement of the terms thereof.

(5) Any director may act by himself or his firm in a professional capacity for the company, and he or his firm shall be entitled to remuneration for professional services as if he were not a director; provided that nothing herein contained shall authorise a director or his firm to act as auditor to the company.

85. All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments, and all receipts for moneys paid to the company, shall be signed, drawn, accepted, endorsed, or otherwise executed, as the case may be, in such manner as the directors shall from time to time by resolution determine.

86. The directors shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors;
- (b) of the names of the directors present at each meeting of the directors and of any committee of the directors;
- (c) of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

87. The directors on behalf of the company may pay a gratuity or pension or allowance on retirement to any director who has held any other salaried office or place of profit with the company or to his widow or dependents and may make contributions to any fund and pay premiums for the purchase or provision of any such gratuity, pension or allowance.

Disqualification of Directors

88. The office of director shall be vacated if the director—
- (a) ceases to be a director by virtue of section 182 or 185 of the Act ; or
 - (b) becomes bankrupt or makes any arrangement or composition with his creditors generally ; or
 - (c) becomes prohibited from being a director by reason of any order made under section 188 of the Act ; or
 - (d) becomes of unsound mind ; or
 - (e) resigns his office by notice in writing to the company ; or
 - (f) shall for more than six months have been absent without permission of the directors from meetings of the directors held during that period.

Rotation of Directors

89. At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office.

90. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

91. A retiring director shall be eligible for re-election.

92. The company at the meeting at which a director retires in manner aforesaid may fill the vacated office by electing a person thereto, and in default the retiring director shall if offering himself for re-election be deemed to have been re-elected, unless at such meeting it is expressly resolved not to fill such vacated office or unless a resolution for the re-election of such director shall have been put to the meeting and lost.

93. No person other than a director retiring at the meeting shall unless recommended by the directors be eligible for election to the office of director at any general meeting unless not less than three nor more than twenty-one days before the date appointed for the meeting there shall have been left at the registered office of the company notice in writing, signed by a member duly qualified to attend and vote at the meeting for which such notice is given, of his intention to propose such person for election, and also notice in writing signed by that person of his willingness to be elected.

94. The company may from time to time by ordinary resolution increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

95. The directors shall have power at any time, and from time to time, to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these regulations. Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at such meeting.

96. The company may by ordinary resolution, of which special notice has been given in accordance with section 142 of the Act, remove any director before the expiration of his period of office notwithstanding anything in these regulations or in any agreement between the company and such director. Such removal shall be without prejudice to any claim such director may have for damages for breach of any contract of service between him and the company.

97. The company may by ordinary resolution appoint another person in place of a director removed from office under the immediately preceding regulation, and without prejudice to the powers of the directors under regulation 95 the company in general meeting may appoint any person to be a director either to fill a casual vacancy or as an additional director. A person appointed in place of a director so removed or to fill such a vacancy shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors

98. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors. It shall not be necessary to give notice of a meeting of directors to any director for the time being absent from the United Kingdom.

99. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two.

100. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors or director may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

101. The directors may elect a chairman of their meetings and determine the period for which he is to hold office ; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

102. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit ; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on it by the directors.

103. A committee may elect a chairman of its meetings ; if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

104. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in the case of an equality of votes the chairman shall have a second or casting vote.

105. All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

106. A resolution in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors, shall be as valid and effectual as if it has been passed at a meeting of the directors duly convened and held.

Managing Director

107. The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment. A director so appointed shall not, whilst holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment shall be automatically determined if he cease from any cause to be a director.

108. A managing director shall receive such remuneration (whether by way of salary, commission or participation in profits, or partly in one way and partly in another) as the directors may determine.

109. The directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit, and either collaterally with or to the exclusion of their own powers and may from time to time revoke, withdraw, alter or vary all or any of such powers.

Secretary

110. The secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit; and any secretary so appointed may be removed by them.

111. No person shall be appointed or hold office as secretary who is—

(a) the sole director of the company; or

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- (b) a corporation the sole director of which is the sole director of the company ; or
- (c) the sole director of a corporation which is the sole director of the company.

112. A provision of the Act or these regulations requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary.

The Seal

113. The directors shall provide for the safe custody of the seal, which shall only be used by the authority of the directors or of a committee of the directors authorised by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.

Dividends and Reserve

114. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

115. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

116. No dividend shall be paid otherwise than out of profits.

117. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit. The directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide.

118. Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall

be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated for the purposes of this regulation as paid on the share. All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that it shall rank for dividend as from a particular date such share shall rank for dividend accordingly.

119. The directors may deduct from any dividend payable to any member all sums of money (if any) presently payable by him to the company on account of calls or otherwise in relation to the shares of the company.

120. Any general meeting declaring a dividend or bonus may direct payment of such dividend or bonus wholly or partly by the distribution of specific assets and in particular of paid up shares, debentures or debenture stock of any other company or in any one or more of such ways, and the directors shall give effect to such resolution, and where any difficulty arises in regard to such distribution, the directors may settle the same as they think expedient, and in particular may issue fractional certificates and fix the value for distribution of such specific assets or any part thereof and may determine that cash payments shall be made to any members upon the footing of the value so fixed in order to adjust the rights of all parties, and may vest any such specific assets in trustees as may seem expedient to the directors.

121. Any dividend, interest or other moneys payable in cash in respect of shares may be paid by cheque or warrant sent through the post directed to the registered address of the holder or, in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register of members or to such person and to such address as the holder or joint holders may in writing direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent. Any one of two or more joint holders may give effectual receipts for any dividends, bonuses or other moneys payable in respect of the shares held by them as joint holders.

122. No dividend shall bear interest against the company.

Accounts

123. The directors shall cause proper books of account to be kept with respect to :—

- (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place ;
- (b) all sales and purchases of goods by the company ; and
- (c) the assets and liabilities of the company.

Proper books shall not be deemed to be kept if there are not kept such books of account as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.

124. The books of account shall be kept at the registered office of the company, or, subject to section 147 (3) of the Act, at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

125. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting.

126. The directors shall from time to time, in accordance with sections 148, 150 and 157 of the Act, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, balance sheets, group accounts (if any) and reports as are referred to in those sections.

127. A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the company in general meeting, together with a copy of the auditors' report, shall not less than twenty-one days before the date of the meeting be sent to every member of, and every holder of debentures of, the company and to every person registered under regulation 31. Provided that this regulation shall not require a copy of those documents to be sent to any person of whose address the company is not aware or to more than one of the joint holders of any shares or debentures.

Capitalisation of Profits

128. The company in general meeting may upon the recommendation of the directors resolve that it is desirable to capitalise any part of the amount for the time being standing to the credit of any of the company's reserve accounts or to the credit of the profit and loss account or otherwise available for distribution, and accordingly that such sum be set free for distribution amongst the members who would have been entitled there to if distributed by way of dividend and in the same proportions on condition that the same be not paid in cash but be applied either in or towards paying up any amounts for the time being unpaid on any shares held by such members respectively or paying up in full unissued shares or debentures of the company to be allotted and distributed credited as fully paid up to and amongst such members in the proportion aforesaid, or partly in the one way and partly in the other, and the directors shall give effect to such resolution :

Provided that a share premium account and a capital redemption reserve fund may, for the purposes of this regulation, only be applied in the paying up of unissued shares to be issued to members of the company as fully paid bonus shares.

129. Whenever such a resolution as aforesaid shall have been passed the directors shall make all appropriations and applications of the undivided profits resolved to be capitalised thereby, and all allotments and issues of fully-paid shares or debentures, if any, and generally shall do all acts and things required to give effect thereto, with full power to the directors to make such provision by the issue of fractional certificates or by payment in cash or otherwise as they think fit for the case of shares or debentures becoming distributable in fractions, and also to authorise any person to enter on behalf of all the members entitled thereto into an agreement with the company providing for the allotment to them respectively, credited as fully paid up, of any further shares or debentures to which they may be entitled upon such capitalisation, or (as the case may require) for the payment up by the company on their behalf, by the application thereto of their respective proportions of the profits resolved to be capitalised, of the amounts or any part of the amounts remaining unpaid on their existing shares, and any agreement made under such authority shall be effective and binding on all such members.

Audit

130. Auditors shall be appointed and their duties regulated in accordance with sections 159 to 162 of the Act.

Notices

131. A notice may be given by the company to any member either personally or by sending it by post to him or to his registered address, or (if he has no registered address within the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notice to him. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of 24 hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post.

132. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the register of members in respect of the share.

133. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, within the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

134. Notice of every general meeting shall be given in any manner hereinbefore authorised to—

- (a) every member except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them ;
- (b) every person upon whom the ownership of a share devolves by reason of his being a legal personal representative or a trustee in bankruptcy of a

member where the member but for his death or bankruptcy would be entitled to receive notice of the meeting ; and

(c) the auditor for the time being of the company.

No other person shall be entitled to receive notices of general meetings.

Winding up

135. If the company shall be wound up the liquidator may, with the sanction of an extraordinary resolution of the company and any other sanction required by the Act, divide amongst the members in specie or kind the whole or any part of the assets of the company (whether they shall consist of property of the same kind or not) and may, for such purpose set such value as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the members or different classes of members. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trusts for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no member shall be compelled to accept any shares or other securities whereon there is any liability.

Indemnity

136. Every director, managing director, agent, auditor, secretary and other officer of the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section 448 of the Act in which relief is granted to him by the court.

PART II

REGULATIONS FOR THE MANAGEMENT OF A PRIVATE COMPANY LIMITED BY SHARES

1. The regulations contained in Part I of Table A (with the exception of regulations 24 and 53) shall apply.

2. The company is a private company and accordingly—

(a) the right to transfer shares is restricted in manner hereinafter prescribed ;

- (b) the number of members of the company (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company were while in such employment and have continued after the determination of such employment to be members of the company) is limited to fifty. Provided that where two or more persons hold one or more shares in the company jointly they shall for the purpose of this regulation be treated as a single member ;
- (c) any invitation to the public to subscribe for any shares or debentures of the company is prohibited ;
- (d) the company shall not have power to issue share warrants to bearer.

3. The directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid share.

4. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business ; save as herein otherwise provided two members present in person or by proxy shall be a quorum.

5. Subject to the provisions of the Act, a resolution in writing signed by all the members for the time being entitled to receive notice of and to attend and vote at general meetings (or being corporations by their duly authorised representatives) shall be as valid and effective as if the same had been passed at a general meeting of the company duly convened and held.

6. The directors may at any time require any person whose name is entered in the register of members of the company to furnish them with any information, supported (if the directors so require) by a statutory declaration, which they may consider necessary for the purpose of determining whether or not the company is an exempt private company within the meaning of subsection (4) of section 129 of the Act.

Note : Regulations 3 and 4 of this Part are alternative to regulations 24 and 53 respectively of Part I.

APPENDIX C

COMPANIES ACT, 1948
FOURTH AND FIFTH SCHEDULES

FOURTH SCHEDULE

MATTERS TO BE SPECIFIED IN PROSPECTUS AND REPORTS
TO BE SET OUT THEREIN

PART I

MATTERS TO BE SPECIFIED

1. The number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

2. The number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors.

3. The names, descriptions and addresses of the directors or proposed directors.

4. Where shares are offered to the public for subscription, particulars as to—

(a) the minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters :—

(i) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;

(ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company ;

(iii) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters ;

(iv) working capital ; and

(b) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

5. The time of the opening of the subscription lists.

6. The amount payable on application and allotment on each share, and, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

7. The number, description and amount of any shares in or debentures of the company which any person has, or is entitled to be given, an option to subscribe for, together with the following particulars of the option, that is to say—

(a) the period during which it is exercisable ;

(b) the price to be paid for shares or debentures subscribed for under it ;

(c) the consideration (if any) given or to be given for it or for the right to it ;

(d) the names and addresses of the persons to whom it or the right to it was given or if given to existing shareholders or debenture holders as such, the relevant shares or debentures.

8. The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.

9.—(1) As respects any property to which this paragraph applies—

(a) the names and addresses of the vendors ;

(b) the amount payable in cash, shares or debentures to the vendor and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor ;

- (c) short particulars of any transaction relating to the property completed within the two preceding years in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter or a director or proposed director of the company had any interest direct or indirect.

(2) The property to which this paragraph applies is property purchased or acquired by the company or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus, other than property—

- (a) the contract for the purchase or acquisition whereof was entered into in the ordinary course of the company's business, the contract not being made in contemplation of the issue nor the issue in consequence of the contract ; or

- (b) as respects which the amount of the purchase money is not material.

10. The amount, if any, paid or payable as purchase money in cash, shares or debentures for any property to which the last foregoing paragraph applies, specifying the amount, if any, payable for goodwill.

11. The amount, if any, paid within the two preceding years, or payable, as commission (but not including commission to sub-underwriters) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or the rate of any such commission.

12. The amount or estimated amount of preliminary expenses and the persons by whom any of those expenses have been paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses have been paid or are payable.

13. Any amount or benefit paid or given within the two preceding years or intended to be paid or given to any promoter, and the consideration for the payment or the giving of the benefit.

14. The dates of, parties to and general nature of every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be

carried on by the company or a contract entered into more than two years before the date of issue of the prospectus.

15. The names and addresses of the auditors, if any, of the company.

16. Full particulars of the nature and extent of the interest, if any, of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him, as a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

17. If the prospectus invites the public to subscribe for shares in the company and the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.

18. In the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the length of time during which the business of the company or the business to be acquired, as the case may be, has been carried on.

PART II

REPORTS TO BE SET OUT

19.—(1) A report by the auditors of the company with respect to—

- (a) profits and losses and assets and liabilities, in accordance with sub-paragraph (2) or (3) of this paragraph, as the case requires; and
- (b) the rates of the dividends, if any, paid by the company in respect of each class of shares in the company in respect of each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years:

and, if no accounts have been made up in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, containing a statement of that fact.

(2) If the company has no subsidiaries, the report shall—

- (a) so far as regards profits and losses, deal with the profits or losses of the company in respect of each of the five financial years immediately preceding the issue of the prospectus; and
- (b) so far as regards assets and liabilities, deal with the assets and liabilities of the company at the last date to which the accounts of the company were made up.

(3) If the company has subsidiaries, the report shall—

- (a) so far as regards profits and losses, deal separately with the company's profits or losses as provided by the last foregoing sub-paragraph, and in addition, deal either—

- (i) as a whole with the combined profits or losses of its subsidiaries, as far as they concern members of the company; or

- (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the company;

or, instead of dealing separately with the company's profits or losses, deal as a whole with the profits or losses of the company and, so far as they concern members of the company, with the combined profits or losses of its subsidiaries; and

- (b) so far as regards assets and liabilities, deal separately with the company's assets and liabilities as provided by the last foregoing sub-paragraph and, in addition, deal either—

- (i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the company's assets and liabilities; or

- (ii) individually with the assets and liabilities of each subsidiary;

and shall indicate as respects the assets and liabilities of the subsidiaries the allowance to be made for persons other than members of the company.

20. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by accountants (who shall be named in the prospectus) upon—

- (a) the profits or losses of the business in respect of each of the five financial years immediately preceding the issue of the prospectus; and
- (b) the assets and liabilities of the business at the last date to which the accounts of the business were made up.

21.—(1) If—

- (a) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in any manner resulting in the acquisition by the company of shares in any other body corporate; and
- (b) by reason of that acquisition or anything to be done in consequence thereof or in connection therewith that body corporate will become a subsidiary of the company;

a report made by accountants (who shall be named in the prospectus) upon—

- (i) the profits or losses of the other body corporate in respect of each of the five financial years immediately preceding the issue of the prospectus; and
- (ii) the assets and liabilities of the other body corporate at the last date to which the accounts of the body corporate were made up.

(2) The said report shall—

- (a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and

- (b) where the other body corporate has subsidiaries, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner provided by sub-paragraph (3) of paragraph 19 of this Schedule in relation to the company and its subsidiaries.

PART III

PROVISIONS APPLYING TO PARTS I AND II OF SCHEDULE

22. Paragraphs 2, 3, 12 (so far as it relates to preliminary expenses) and 16 of this Schedule shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

23. Every person shall for the purposes of this Schedule, be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

- (a) the purchase money is not fully paid at the date of the issue of the prospectus ;
- (b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ;
- (c) the contract depends for its validity or fulfilment on the result of that issue.

24. Where any property to be acquired by the company is to be taken on lease, this Schedule shall have effect as if the expression " vendor " included the lessor, and the expression " purchase money " included the consideration for the lease, and the expression " sub-purchaser " included a sub-lessee.

25. References in paragraph 7 of this Schedule to subscribing for shares or debentures shall include acquiring them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale.

26. For the purposes of paragraph 9 of this Schedule where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

27. If in the case of a company which has been carrying on business, or of a business which has been carried on for

less than five years, the accounts of the company or business have only been made up in respect of four years, three years, two years or one year, Part II of this Schedule shall have effect as if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years.

28. The expression "financial year" in Part II of this Schedule means the year in respect of which the accounts of the company or of the business, as the case may be, are made up, and where by reason of any alteration of the date on which the financial year of the company or business terminates the accounts of the company or business have been made up for a period greater or less than a year, that greater or less period shall for the purpose of that Part of this Schedule be deemed to be a financial year.

29. Any report required by Part II of this Schedule shall either indicate by way of note any adjustments as respects the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make those adjustments and indicate that adjustments have been made.

30. Any report by accountants required by Part II of this Schedule shall be made by accountants qualified under this Act for appointment as auditors of a company which is not an exempt private company and shall not be made by any accountant who is an officer or servant, or a partner of or in the employment of an officer or servant, of the company or of the company's subsidiary or holding company or of a subsidiary of the company's holding company; and for the purposes of this paragraph the expression "officer" shall include a proposed director but not an auditor,

FIFTH SCHEDULE

FORM OF STATEMENT IN LIEU OF PROSPECTUS TO BE
DELIVERED TO REGISTRAR BY A COMPANY WHICH DOES NOT
ISSUE A PROSPECTUS OR WHICH DOES NOT GO TO ALLOTMENT
ON A PROSPECTUS ISSUED AND REPORTS TO BE SET OUT
THEREIN

PART I

FORM OF STATEMENT AND PARTICULARS TO BE CONTAINED
THEREIN

THE COMPANIES ACT, 1948

Statement in lieu of Prospectus delivered for registration by
[*Insert the name of the company*]

Pursuant to section 48 of the Companies Act, 1948

Delivered for registration by

The nominal share capital of the company.	£
Divided into	Shares of £ each
	" " "
Amount (if any) of above capital which consists of redeemable preference shares.	" " " Shares of £ each.
The earliest date on which the company has power to redeem these shares.	
Names, descriptions and addresses of directors or proposed directors.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	

Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. shares of £ fully paid.
The consideration for the intended issue of those shares and debentures.	2. shares upon which £ per share credited as paid.
	3. debenture £ .
	4. Consideration:—
Number, description and amount of any shares or debentures which any person has or is entitled to be given an option to subscribe for, or to acquire from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale.	1. shares of £ and debentures of £ .
Period during which option is exercisable.	2. Until
Price to be paid for shares or debentures subscribed for or acquired under option.	3.
Consideration for option or right to option.	4. Consideration :
Persons to whom option or right to option was given or, if given to existing shareholders or debenture holders as such, the relevant shares or debentures.	5. Names and addresses :
Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company except where the contract for its purchase or acquisition was entered into in the ordinary course of the business intended to be carried on by the company or the amount of the purchase money is not material.	

Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £ Cash .. £ Shares .. £ Debentures.. £ Goodwill .. £
Short particulars of any transaction relating to any such property which was completed within the two preceding years and in which any vendor to the company or any person who is, or was at the time thereof, a promoter, director or proposed director of the company had any interest direct or indirect.	
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company ; or	Amount paid, ,, payable.
Rate of the commission.. ..	Rate per cent.
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Estimated amount of preliminary expenses.	£
By whom those expenses have been paid or are payable.	
Amount paid or intended to be paid to any promoter.	Name of promoter Amount £ .
Consideration for the payment	Consideration :—

Any other benefit given or intended to be given to any promoter.

Consideration for giving of benefit

Dates of, parties to and general nature of every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the delivery of this statement).

Time and place at which the contracts or copies thereof may be inspected or (1) in the case of a contract not reduced into writing, a memorandum giving full particulars thereof, and (2) in the case of a contract wholly or partly in a foreign language, a copy of a translation thereof in English or embodying a translation in English of the parts in a foreign language, as the case may be, being a translation certified in the prescribed manner to be a correct translation.

Names and addresses of the auditors of the company (if any).

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of

Name of promoter :—

Nature and value of benefit :—

Consideration :—

the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

(Signatures of the persons above-named
as directors or proposed directors, or
of their agents authorised in writing.)

Date

PART II

REPORTS TO BE SET OUT

1. Where it is proposed to acquire a business, a report made by accountants (who shall be named in the statement) upon—

- (a) the profits or losses of the business in respect of each of the five financial years immediately preceding the delivery of the statement to the registrar; and
- (b) the assets and liabilities of the business at the last date to which the accounts of the business were made up.

2.—(1) Where it is proposed to acquire shares in a body corporate which by reason of the acquisition or anything to be done in consequence thereof or in connection therewith will become a subsidiary of the company, a report made by accountants (who shall be named in the statement) with respect to the profits and losses and assets and liabilities of the other body corporate in accordance with subparagraph (2) or (3) of this paragraph, as the case requires,

indicating how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company, and what allowance would have fallen to be made in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired.

(2) If the other body corporate has no subsidiaries, the report referred to in the last foregoing sub-paragraph shall—

- (a) so far as regards profits and losses, deal with the profits or losses of the body corporate in respect of each of the five financial years immediately preceding the delivery of the statement to the registrar; and
- (b) so far as regards assets and liabilities, deal with the assets and liabilities of the body corporate at the last date to which the accounts of the body corporate were made up.

(3) If the other body corporate has subsidiaries, the report referred to in sub-paragraph (1) of this paragraph shall—

- (a) so far as regards profits and losses, deal separately with the other body corporate's profits or losses as provided by the last foregoing sub-paragraph, and in addition deal either—
 - (i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern members of the other body corporate; or
 - (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the other body corporate;or, instead of dealing separately with the other body corporate's profits or losses, deal as a whole with the profits or losses of the other body corporate and, so far as they concern members of the other body corporate, with the combined profits or losses of its subsidiaries; and
- (b) so far as regards assets and liabilities, deal separately with the other body corporate's assets and liabilities as provided by the last foregoing sub-paragraph and, in addition, deal either—

(i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the other body corporate's assets and liabilities; or

(ii) individually with the assets and liabilities of each subsidiary ;

and shall indicate as respects the assets and liabilities of the subsidiaries the allowance to be made for persons other than members of the company.

PART III

PROVISIONS APPLYING TO PARTS I AND II OF THIS SCHEDULE

3. In this Schedule the expression " vendor " includes a vendor as defined in Part III of the Fourth Schedule to this Act, and the expression " financial year " has the meaning assigned to it in that Part of that Schedule.

4. If in the case of a business which has been carried on, or of a body corporate which has been carrying on business for less than five years, the accounts of the business or body corporate have only been made up in respect of four years, three years, two years or one year, Part II of this Schedule shall have effect as if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years.

5. Any report required by Part II of this Schedule shall either indicate by way of note any adjustments as respects the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make those adjustments and indicate that adjustments have been made.

6. Any report by accountants required by Part II of this Schedule shall be made by accountants qualified under this Act for appointment as auditors of a company which is not an exempt private company and shall not be made by any accountant who is an officer or servant, or a partner of or in the employment of an officer or servant, of the company or of the company's subsidiary or holding company or of a subsidiary of the company's holding company ; and for the purposes of this paragraph the expression " officer " shall include a proposed director but not an auditor.

FORM OF PROSPECTUS

A copy of this prospectus has been delivered to the Registrar of Companies for registration

Consent of the Treasury has been obtained to this issue under Regulation 6 of the Defence (Finance) Regulations, 1939. It must be distinctly understood that in giving this consent the Treasury takes no responsibility for the financial soundness of any schemes or for the correctness of any of the statements made or opinions expressed with regard to them.

The List of Applications will open on Monday, the 3rd January, 1949 at 10 a.m. and will close on the same day (N.B. Applications for shares are not revocable until after the 6th January, 1949, pursuant to section 50 (5) of the Companies Act, 1948).

BLANK COMPANY, LIMITED

(Incorporated under the Companies Act, 1948)

Capital £140,000

Divided into

14,000 6 per cent. cumulative preference shares of	£
£5 each 	70,000
14,000 ordinary shares of £5 each 	70,000

Issue of

12,000 6 per cent. cumulative preference shares of	
£5 each 	60,000
14,000 ordinary shares of £5 each 	70,000
	<hr/>
	£130,000

Payable in full on application

Application will be made to the Council of the Stock Exchange, London, for permission to deal in the whole of the issued preference and ordinary shares of the company. Pursuant to section 51 of the Companies Act, 1948, acceptance of applications will be conditional upon the Council of the Stock Exchange granting permission to deal prior to 13th February, 1949 unless notification is received before that date that permission to deal has been refused. In that

event, application moneys will be returned to applicants and in the meantime will be retained in a separate bank account.

The preference shares are entitled to a preference as to capital and dividend over the ordinary shares. It is intended to pay dividends thereon half-yearly on July 15th and January 15th.

On a show of hands each member present in person shall have one vote, and on a poll each member present in person or by proxy shall have one vote for each ordinary share held by him, and one vote for every five preference shares held by him.

Directors :

A. Smith, of	, Director of Companies
J. G. B., of	, Brewer
R. C., of	, Brewer

Solicitors :

G. F. & Co.

Bankers :

C. & C. Bank

Brokers :

J. K. & Co. of and the Stock Exchange, London

Auditors :

G. H. & Co. of

Secretary and Offices :

J. King,
Fleet Street, E.C.

PROSPECTUS

This company was formed on December 10, 1948 to acquire, as from that date, the whole of the business of Jones & Sons, established upwards of 100 years.

The property acquired by the new company comprises :

- (a) The freehold brewery and maltings known as Blank Brewery.
- (b) Ninety-nine freehold licensed houses.
- (c) Ten leasehold licensed houses.
- (d) Dwelling-houses, shops, cottages, stabling, and valuable land.

The brewery premises cover a large area, and are in good and substantial repair. There are two good maltings of 90 and 30 quarters capacity respectively. The plant is equal to 30 quarters. The brewery is well found in loose and moveable stocks, casks, drays, and other appliances.

AUDITORS' REPORT.—The following is a copy which has been received from

Messrs. G. H. & Co. :—

To :—Messrs. Jones & Sons,
Fleet Street, E.C.

Hillside Chambers,
College Green,
London, E.C.4.
30th December, 1948.

GENTLEMEN,

As auditors of your company, we report that we have examined the books of your company and audited the accounts for the five years ended October, 1948. We further report that the profits for those years prepared in accordance with the basis explained below, were as follows :—

Years ended 31st October	Profits as defined below	N.D.C., E.P.T.	Net Profits subject to Income Tax
	I	II	III
	£	£	£
1944 ..	17,403	3,643	13,760
1945 ..	15,668	2,668	13,000
1946 ..	16,714	4,214	12,500
1947 ..	17,122	1,522	15,600
1948 ..	20,450		20,450

The profits shown in column 1 are after charging all working expenses, depreciation as allowed for income tax purposes, and partners' remuneration and commissions at the rates applicable to directors in the future amounting to £6,000, but before charging income tax and after making such adjustments as we consider appropriate.

The following is a statement of Assets and Liabilities of Messrs. Jones & Sons, prepared on the basis of the last audited Balance Sheet at 31st October, 1948—

FIXED ASSETS at cost less depreciation—

	£	£
Freehold Brewery and Maltings ..	20,000	
Freehold Licensed Premises ..	160,000	
Leasehold Licensed Houses ..	8,000	
Dwelling-houses, shops, cottages, stabling and land	14,591	
	<hr/>	202,591

CURRENT ASSETS

Stocks on hand as valued by the senior partner	4,000	
Book Debts	5,000	
Loans	504	
	<hr/>	9,504

TOTAL ASSETS £212,095

The LIABILITIES of the business at that date were—

	£
Sundry Trade Creditors and Accrued Expenses	2,000
Taxation	8,000
	<hr/>
	10,000

	£
PROPRIETORS' CAPITAL ..	150,000
UNDISTRIBUTED PROFITS ..	52,095
	<hr/>
	202,095
	<hr/>
	£212,095

Yours faithfully,

G. H. & Co.,

Auditors.

The purchase price of the properties to be acquired including the two properties mentioned, has been fixed by the vendors, Messrs. B. and L., of , at £211,591 payable as to £100,000 by the allotment of first mortgage debenture stock of that amount, and the balance in cash. The price for the loans, stocks, book debts, casks, horses, drays, etc., has been taken at £8,500. The properties acquired have been examined and reported upon for the purposes of this purchase by Mr. A. Smith, the managing director of the Thames Brewery Co., Limited and a director of this company, as being of a value in excess of

the purchase consideration, apart from any goodwill attaching to the brewery. No part of the purchase price is, therefore, paid in respect of goodwill.

VALUATION :—The following is a copy of the Valuation of Mr. A. Smith, managing director of Thames Brewery Company, Limited and a director of this company—To the Board of Directors of Blank Company Limited. -

"I hereby declare that I have carried out an independent valuation of the company's properties for the purpose of advising as to the fair value of those assets.

In my opinion, the value of those properties is in excess of the purchase consideration and that a fair value as a going concern is as follows—

	£
Freehold Brewery and Maltings ..	25,000
Freehold Licensed Premises	165,000
Leasehold Licensed Premises	9,000
Dwelling-houses, shops, cottages, stabling, etc.	15,000
	<hr/>
	£214,000
	<hr/>

This figure is exclusive of any value for stock, casks or goodwill.

Yours faithfully,

2nd November, 1948

(Signed) A. Smith."

The original of this valuation certificate has been filed with the Registrar of Joint Stock Companies.

STATEMENT PURSUANT TO SECTION 40 OF THE COMPANIES ACT, 1948 :

" I A. Smith hereby declare that I have given my consent to the statement as aforesaid appearing in the prospectus, and that I have not withdrawn that consent.

(Signed) A. Smith."

The properties are sold to this company by Messrs. B. and I., of , who recently purchased them from Jones & Sons, Limited, for the sum of £202,591 5s. 6d.

AUDITORS' REPORT TO THE COMPANY :—

To the Directors,
Blank Company, Ltd.,
London, E.C.

Hillside Chambers,
College Green, E.C. 4.
December 30, 1948.

GENTLEMEN,

We report that the company was formed on December 10, 1948, and that no accounts have been made up and no dividends declared or paid on any of its shares since its incorporation.

Yours faithfully,
G. H. & Co.,
Auditors.

The minimum subscription to provide for the matters specified in Clause 4 of the Fourth Schedule to the Companies Act, 1948, is £20,000. The proceeds of this issue are to be applied as follows :—

	£
Cash payment on properties to be acquired	111,591
Preliminary expenses estimated at ..	7,000
Underwriting commission	6,000
	<hr/>
	124,591
WORKING CAPITAL (which in the opinion of the directors is sufficient) ..	5,409
	<hr/>
	£130,000

The purchase price of the properties to be acquired at £211,591 is payable as to £100,000 by allotment of first mortgage debenture stock, and the balance in cash from the proceeds of this issue.

The whole of the present issue has been underwritten by Messrs. B. and I. in consideration of the sum of £6,000.

PROFITS :—The profits on the basis of the year ended 31st October, 1948, as shown by the auditors' report after providing for the annual fixed dividend of £3,600 (gross) on the preference capital would amount to £16,850 (subject to taxation) which is equivalent to 24.09 per cent. on the issued Ordinary Share Capital.

The company will pay all the preliminary expenses relating to the formation of the company, the issue of this prospectus, the preparation of the contracts hereafter mentioned, the registration of the company, and the fee of Mr. A. Smith, one of the directors, for his services in negotiating the purchase and reporting upon the properties amounting to £1,000.

The whole of such preliminary expenses are estimated to amount to £7,000 and the cost of underwriting as above, is £6,000, and is payable by the company.

STATUTORY INFORMATION :—No offers for subscription for either shares or debentures of the company have been made within the two preceding years.

No person has or will be given an option to subscribe for shares or debentures of the company.

No amount is payable for goodwill.

No amount has been paid or is payable as commission within the two preceding years for subscribing or agreeing to subscribe for shares or debentures of the company.

No benefits have been paid or given within the two preceding years or intended to be paid or given to any promoter.

The following particulars are of material contracts (not being contracts entered into in the ordinary course of business) :—

1. Dated November 20th, 1948, between Thomas Jones of on behalf of Jones & Sons, Limited, of the one part, and J. G. B. and A. W. I. of the other part being the contract for sale of the properties above mentioned to Messrs. B. and I. for £202,591.

2. Dated November 26th, 1948, between the said B. and I. of the one part, and this company of the other part being the contract for sale above mentioned by Messrs. B. and I. to the company for £211,591.

There is also a verbal contract made in or about the month of October, 1948, between the said Messrs. B. and I. and the said A. Smith for payment to him of the fee above mentioned.

Mr. J. G. B. is interested in the sale as partner in the firm of B. and I. : Mr. A. Smith is interested to the extent of the receipt of the fee above mentioned.

The articles of association provide as follows :

The qualification of every director shall be the holding in his own right of shares in the company of £500 nominal value.

The directors respectively shall be entitled to be repaid out of the funds of the company all personal expenses incurred in or about the business of the company, and in addition thereto, each of the first directors (other than the managing director) shall be paid for his remuneration out of the funds of the company at the rate of £100 per annum.

Copies of the valuer's report and of the above mentioned contracts, including the auditors' report as to adjustments mentioned as having been made therein and the reasons therefor are available for inspection during the 14 days beginning on December 28, 1948, or upon other dates with the permission of the Board of Trade.

The company will pay a brokerage of one-half per cent. on all allotments made in respect of applications bearing brokers' stamps. Application for a settlement and quotation for this issue of preference and ordinary shares will be made in due course.

Prospectuses and forms of application may also be obtained at the offices of the company, or from the solicitors, bankers, and brokers.

December 28th, 1948.

(One copy is signed by every person who is named herein as a director or proposed director.)

APPENDIX D

COMPANIES ACT, 1948
SCHEDULES EIGHT AND NINE
AND BALANCE SHEETS

EIGHTH SCHEDULE

ACCOUNTS

PRELIMINARY

1. Paragraphs 2 to 11 of this Schedule apply to the balance sheet and 12 to 14 to the profit and loss account, and are subject to the exceptions and modifications provided for by Part II of this Schedule in the case of a holding company and by Part III thereof in the case of companies of the classes there mentioned; and this Schedule has effect in addition to the provisions of sections one hundred and ninety-six and one hundred and ninety-seven of this Act.

PART I

GENERAL PROVISIONS AS TO BALANCE SHEET AND
PROFIT AND LOSS ACCOUNT*Balance Sheet*

2. The authorised share capital, issued share capital, liabilities and assets shall be summarised, with such particulars as are necessary to disclose the general nature of the assets and liabilities, and there shall be specified—

- (a) any part of the issued capital that consists of redeemable preference shares, and the earliest date on which the company has power to redeem those shares;
- (b) so far as the information is not given in the profit and loss account, any share capital on which interest has been paid out of capital during the financial year, and the rate at which interest has been so paid;
- (c) the amount of the share premium account;
- (d) particulars of any redeemed debentures which the company has power to re-issue.

3. There shall be stated under separate headings, so far as they are not written off,—

- (a) the preliminary expenses;

- (b) any expenses incurred in connection with any issue of share capital or debentures;
- (c) any sums paid by way of commission in respect of any shares or debentures;
- (d) any sums allowed by way of discount in respect of any debentures; and
- (e) the amount of the discount allowed on any issue of shares at a discount.

4.—(1) The reserves, provisions, liabilities and fixed and current assets shall be classified under headings appropriate to the company's business:

Provided that—

- (a) where the amount of any class is not material, it may be included under the same heading as some other class; and
 - (b) where any assets of one class are not separable from assets of another class, those assets may be included under the same heading.
- (2) Fixed assets shall also be distinguished from current assets.
- (3) The method or methods used to arrive at the amount of the fixed assets under each heading shall be stated.

5.—(1) The method of arriving at the amount of any fixed asset shall, subject to the next following sub-paragraph, be to take the difference between—

- (a) its cost or, if it stands in the company's books at a valuation, the amount of the valuation; and
- (b) the aggregate amount provided or written off since the date of acquisition or valuation, as the case may be, for depreciation or diminution in value;

and for the purposes of this paragraph the net amount at which any assets stand in the company's books at the commencement of this Act (after deduction of the amounts previously provided or written off for depreciation or diminution in value) shall, if the figures relating to the period before the commencement of this Act cannot be obtained without unreasonable expense or delay, be treated as if it were the amount of a valuation of those assets made at the commencement of this Act and, where any of those assets are sold, the said net amount less the amount of the sales shall be treated as if it were the amount of a valuation so made of the remaining assets.

(2) The foregoing sub-paragraph shall not apply—

(a) to assets for which the figures relating to the period beginning with the commencement of this Act cannot be obtained without unreasonable expense or delay ; or

(b) to assets the replacement of which is provided for wholly or partly—

(i) by making provision for renewals and charging the cost of replacement against the provision so made ; or

(ii) by charging the cost of replacement direct to revenue ; or

(c) to any investments of which the market value (or, in the case of investments not having a market value, their value as estimated by the directors) is shown either as the amount of the investments or by way of note ; or

(d) to goodwill, patents or trade marks.

(3) For the assets under each heading whose amount is arrived at in accordance with sub-paragraph (1) of this paragraph, there shall be shown—

(a) the aggregate of the amounts referred to in paragraph (a) of that sub-paragraph ; and

(b) the aggregate of the amounts referred to in paragraph (b) thereof.

(4) As respects the assets under each heading whose amount is not arrived at in accordance with the said sub-paragraph (1) because their replacement is provided for as mentioned in sub-paragraph (2) (b) of this paragraph, there shall be stated—

(a) the means by which their replacement is provided for ; and

(b) the aggregate amount of the provisions (if any) made for renewals and not used,

6. The aggregate amounts respectively of capital reserves, revenue reserves and provisions (other than provisions for depreciation, renewals or diminution in value of assets) shall be stated under separate headings :

Provided that—

(a) this paragraph shall not require a separate statement of any of the said three amounts which is not material ; and

- (b) the Board of Trade may direct that it shall not require a separate statement of the amount of provisions where they are satisfied that that is not required in the public interest and would prejudice the company, but subject to the condition that any heading stating an amount arrived at after taking into account a provision (other than as aforesaid) shall be so framed or marked as to indicate that fact.

7.—(1) There shall also be shown (unless it is shown in the profit and loss account or a statement or report annexed thereto, or the amount involved is not material)—

- (a) where the amount of the capital reserves, of the revenue reserves or of the provisions (other than provisions for depreciation, renewals or diminution in value of assets) shows an increase as compared with the amount at the end of the immediately preceding financial year, the source from which the amount of the increase has been derived ; and

(b) where—

(i) the amount of the capital reserves or of the revenue reserves shows a decrease as compared with the amount at the end of the immediately preceding financial year ; or

(ii) the amount at the end of the immediately preceding financial year of the provisions (other than provisions for depreciation, renewals or diminution in value of assets) exceeded the aggregate of the sums since applied and amounts still retained for the purposes thereof ;

the application of the amounts derived from the difference.

(2) Where the heading showing any of the reserves or provisions aforesaid is divided into sub-headings, this paragraph shall apply to each of the separate amounts shown in the sub-headings instead of applying to the aggregate amount thereof.

8.—(1) There shall be shown under separate headings—

- (a) the aggregate amounts respectively of the company's trade investments, quoted investments other than trade investments and unquoted investments other than trade investments ;

- (b) if the amount of the goodwill and of any patents and trademarks or part of that amount is shown as a separate item in or is otherwise ascertainable from the books of the company, or from any contract for the sale or purchase of any property to be acquired by the company, or from any documents in the possession of the company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property, the said amount so far as not written off or as the case may be, the said amount so far as it is so shown or ascertainable and as so shown or ascertained, as the case may be;
- (c) the aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) of subsection (1) of section fifty four of this Act;
- (d) the aggregate amount of bank loans and overdrafts;
- (e) the net aggregate amount (after deduction of income tax) which is recommended for distribution by way of dividend.

(2) Nothing in head (b) of the foregoing sub-paragraph shall be taken as requiring the amount of the goodwill, patents and trade marks to be stated otherwise than as a single item.

(3) The heading showing the amount of the quoted investments other than trade investments shall be subdivided, where necessary, to distinguish the investments as respects which there has, and those as respects which there has not, been granted a quotation or permission to deal on a recognised stock exchange.

9. Where any liability of the company is secured otherwise than by operation of law on any assets of the company, the fact that that liability is so secured shall be stated, but it shall not be necessary to specify the assets on which the liability is secured.

10. Where any of the company's debentures are held by a nominee of or trustee for the company, the nominal amount of the debentures and the amount at which they are stated in the books of the company shall be stated.

11.—(1) The matters referred to in the following sub-paragraphs shall be stated by way of note, or in a statement or report annexed, if not otherwise shown.

(2) The number, description and amount of any shares in the company which any person has an option to subscribe for, together with the following particulars of the option, that is to say—

(a) the period during which it is exercisable ;

(b) the price to be paid for shares subscribed for under it.

(3) The amount of any arrears of fixed cumulative dividends on the company's shares and the period for which the dividends or, if there is more than one class, each class of them are in arrear, the amount to be stated before deduction of income tax, except that, in the case of tax free dividends, the amount shall be shown free of tax and the fact that it is so shown shall also be stated.

(4) Particulars of any charge on the assets of the company to secure the liabilities of any other person, including, where practicable, the amount secured.

(5) The general nature of any other contingent liabilities not provided for and, where practicable, the aggregate amount or estimated amount of those liabilities, if it is material.

(6) Where practicable the aggregate amount or estimated amount, if it is material, of contracts for capital expenditure, so far as not provided for.

(7) If in the opinion of the directors any of the current assets have not a value, on realisation in the ordinary course of the company's business, at least equal to the amount at which they are stated, the fact that the directors are of that opinion.

(8) The aggregate market value of the company's quoted investments, other than trade investments, where it differs from the amount of the investments as stated, and the stock exchange value of any investments of which the market value is shown (whether separately or not) and is taken as being higher than their stock exchange value.

(9) The basis on which foreign currencies have been converted into sterling, where the amount of the assets or liabilities affected is material.

(10) The basis on which the amount, if any, set aside for United Kingdom income tax is computed.

(11) Except in the case of the first balance sheet laid before the company after the commencement of this Act, the corresponding amounts at the end of the immediately preceding financial year for all items shown in the balance sheet.

Profit and Loss Account

12.—(1) There shall be shown—

- (a) the amount charged to revenue by way of provision for depreciation, renewals or diminution in value of fixed assets ;
- (b) the amount of the interest on the company's debentures and other fixed loans ;
- (c) the amount of the charge for United Kingdom income tax and other United Kingdom taxation on profits, including, where practicable, as United Kingdom income tax, any taxation imposed elsewhere to the extent of the relief, if any, from United Kingdom income tax and distinguishing where practicable between income tax and other taxation ;
- (d) the amounts respectively provided for redemption of share capital and for redemption of loans ;
- (e) the amount, if material, set aside or proposed to be set aside to, or withdrawn from, reserves ;
- (f) subject to sub-paragraph (2) of this paragraph, the amount, if material, set aside to provisions other than provisions for depreciation, renewals or diminution in value of assets or, as the case may be, the amount, if material, withdrawn from such provisions and not applied for the purposes thereof ;
- (g) the amount of income from investments, distinguishing between trade investments and other investments ;
- (h) the aggregate amount of the dividends paid and proposed.

(2) The Board of Trade may direct that a company shall not be obliged to show an amount set aside to provisions in accordance with sub-paragraph (1) (f) of this paragraph, if the Board is satisfied that that is not required in the public interest and would prejudice the company, but subject to the condition that any heading stating an amount arrived at after taking into account the amount set aside as aforesaid shall be so framed or marked as to indicate that fact.

13.—If the remuneration of the auditors is not fixed by the company in general meeting, the amount thereof shall be shown under a separate heading, and for the purposes of this paragraph, any sums paid by the company in respect of the auditors' expenses shall be deemed to be included in the expression "remuneration".

14.—(1) The matters referred to in the following subparagraphs shall be stated by way of note, if not otherwise shown.

(2) If depreciation or replacement of fixed assets is provided for by some method other than a depreciation charge or provisions for renewals, or is not provided for, the method by which it is provided for or the fact that it is not provided for, as the case may be.

(3) The basis on which the charge for United Kingdom income tax is computed.

(4) Whether or not the amount stated for dividends paid and proposed is for dividends subject to deduction of income tax.

(5) Except in the case of the first profit and loss account laid before the company after the commencement of this Act the corresponding amounts for the immediately preceding financial year for all items shown in the profit and loss account.

(6) Any material respects in which any items shown in the profit and loss account are affected—

(a) by transactions of a sort not usually undertaken by the company or otherwise by circumstances of an exceptional or non-recurrent nature ; or

(b) by any change in the basis of accounting.

PART II.

SPECIAL PROVISIONS WHERE THE COMPANY IS A HOLDING OR SUBSIDIARY COMPANY.

Modifications of and additions to requirements as to company's own accounts

15.—(1) This paragraph shall apply where the company is a holding company, whether or not it is itself a subsidiary of another body corporate.

(2) The aggregate amount of assets consisting of shares in, or amounts owing (whether on account of a loan or otherwise) from, the company's subsidiaries, distinguishing shares from indebtedness, shall be set out in the balance sheet separately from all the other assets of the company, and the aggregate amount of indebtedness (whether on account of a loan or otherwise) to the company's subsidiaries shall be so set out separately from all its other liabilities and—

- (a) the references in Part I of this Schedule to the company's investments shall not include investments in its subsidiaries required by this paragraph to be separately set out; and
- (b) paragraph 5, sub-paragraph (1) (a) of paragraph 12, and sub-paragraph (2) of paragraph 14 of this Schedule shall not apply in relation to fixed assets consisting of interests in the company's subsidiaries.

(3) There shall be shown by way of note on the balance sheet or in a statement or report annexed thereto the number, description and amount of the shares in and debentures of the company held by its subsidiaries or their nominees, but excluding any of those shares or debentures in the case of which the subsidiary is concerned as personal representative or in the case of which it is concerned as trustee and neither the company nor any subsidiary thereof is beneficially interested under the trust, otherwise than by way of security only for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money.

(4) Where group accounts are not submitted, there shall be annexed to the balance sheet a statement showing—

- (a) the reasons why subsidiaries are not dealt with in group accounts;
- (b) the net aggregate amount, so far as it concerns members of the holding company and is not dealt with in the company's accounts, of the subsidiaries' profits after deducting the subsidiaries' losses (or vice versa)—
 - (i) for the respective financial years of the subsidiaries ending with or during the financial year of the company; and
 - (ii) for their previous financial years since they respectively became the holding company's subsidiary;
- (c) the net aggregate amount of the subsidiaries' profits after deducting the subsidiaries' losses (or vice versa)—
 - (i) for the respective financial years of the subsidiaries ending with or during the financial year of the company; and

(ii) for their other financial years since they respectively became the holding company's subsidiary ;

so far as those profits are dealt with, or provision is made for those losses, in the company's accounts ;

- (d) any qualifications contained in the report of the auditors of the subsidiaries on their accounts for their respective financial years ending as aforesaid, and any note or saving contained in those accounts to call attention to a matter which, apart from the note or saving, would properly have been referred to in such a qualification, in so far as the matter which is the subject of the qualification or note is not covered by the company's own accounts and is material from the point of view of its members ;

or, in so far as the information required by this sub-paragraph is not obtainable, a statement that it is not obtainable :

Provided that the Board of Trade may, on the application or with the consent of the company's directors, direct that in relation to any subsidiary this sub-paragraph shall not apply or shall apply only to such extent as may be provided by the direction.

(5) Paragraphs (b) and (c) of the last foregoing sub-paragraph shall apply only to profits and losses of a subsidiary which may properly be treated in the holding company's accounts as revenue profits or losses, and the profits or losses attributable to any shares in a subsidiary for the time being held by the holding company or any other of its subsidiaries shall not (for that or any other purpose) be treated as aforesaid so far as they are profits or losses for the period before the date on or as from which the shares were acquired by the company or any of its subsidiaries, except that they may in a proper case be so treated where—

(a) the company is itself the subsidiary of another body corporate ; and

(b) the shares were acquired from that body corporate or a subsidiary of it ;

and for the purpose of determining whether any profits or losses are to be treated as profits or losses for the said period the profit or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with reasonable

accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly.

(6) Where group accounts are not submitted, there shall be annexed to the balance sheet a statement showing, in relation to the subsidiaries (if any) whose financial years did not end with that of the company—

- (a) the reasons why the company's directors consider that the subsidiaries' financial years should not end with that of the company; and
- (b) the dates on which the subsidiaries' financial years ending last before that of the company respectively ended or the earliest and latest of those dates.

16.—(1) The balance sheet of a company which is a subsidiary of another body corporate, whether or not it is itself a holding company, shall show the aggregate amount of its indebtedness to all bodies corporate of which it is a subsidiary or a fellow subsidiary and the aggregate amount of the indebtedness of all such bodies corporate to it, distinguishing in each case between indebtedness in respect of debentures and otherwise.

(2) For the purposes of this paragraph a company shall be deemed to be a fellow subsidiary of another body corporate if both are subsidiaries of the same body corporate but neither is the other's.

Consolidated Accounts of Holding Company and Subsidiaries

17. Subject to the following paragraphs of this Part of this Schedule, the consolidated balance sheet and profit and loss account shall combine the information contained in the separate balance sheets and profit and loss accounts of the holding company and of the subsidiaries dealt with by the consolidated accounts, but with such adjustments (if any) as the directors of the holding company think necessary.

18. Subject as aforesaid and to Part III of this Schedule, the consolidated accounts shall, in giving the said information, comply, so far as practicable, with the requirements of this Act as if they were the accounts of an actual company.

19. Sections one hundred and ninety-six and one hundred and ninety-seven of this Act shall not, by virtue of the two last foregoing paragraphs, apply for the purpose of the consolidated accounts.

20. Paragraph 7 of this Schedule shall not apply for the purpose of any consolidated accounts laid before a company with the first balance sheet so laid after the commencement of this Act.

21. In relation to any subsidiaries of the holding company not dealt with by the consolidated accounts—

- (a) sub-paragraphs (2) and (3) of paragraph 15 of this Schedule shall apply for the purpose of those accounts as if those accounts were the accounts of an actual company of which they were subsidiaries; and
- (b) there shall be annexed the like statement as is required by sub-paragraph (4) of that paragraph where there are no group accounts, but as if references therein to the holding company's accounts were references to the consolidated accounts.

22. In relation to any subsidiaries (whether or not dealt with by the consolidated accounts), whose financial years did not end with that of the company, there shall be annexed the like statement as is required by sub-paragraph (6) of paragraph 15 of this Schedule where there are no group accounts.

PART III.

EXCEPTIONS FOR SPECIAL CLASSES OF COMPANY.

23.—(1) A banking or discount company shall not be subject to the requirements of Part I of this Schedule other than—

- (a) as respects its balance sheet, those of paragraphs 2 and 3, paragraph 4 (so far as it relates to fixed and current assets), paragraph 8 (except sub-paragraph (1) (d)), paragraphs 9 and 10, paragraph 11 (except sub-paragraph (8)); and
- (b) as respects its profit and loss account, those of sub-paragraph (1) (h) of paragraph 12, paragraph 13 and sub-paragraphs (1), (4) and (5) of paragraph 14;

but, where in its balance sheet capital reserves, revenue reserves or provisions (other than provisions for depreciation, renewals or diminution in value of assets) are not stated separately, any heading stating an amount arrived at after taking into account such a reserve or provision shall be so framed or marked as to indicate that fact, and its profit and

loss account shall indicate by appropriate words the manner in which the amount stated for the company's profit or loss has been arrived at.

(2) The accounts of a banking or discount company shall not be deemed, by reason only of the fact that they do not comply with any requirements of the said Part I from which the company is exempt by virtue of this paragraph, not to give the true and fair view required by this Act.

(3) In this paragraph the expression "banking or discount company" means any company which satisfies the Board of Trade that it ought to be treated for the purposes of this Schedule as a banking company or as a discount company.

24.—(1) In relation to an assurance company within the meaning of the Assurance Companies Acts, 1909 to 1946, which is subject to and complies with the requirements of those Acts as respects the preparation and deposit with the Board of Trade of a balance sheet and profit and loss account, the foregoing paragraph shall apply as it applies in relation to a banking or discount company, and such an assurance company shall also not be subject to the requirements of sub-paragraphs (1) (a) and (3) of paragraph 8 and sub-paragraphs (4) to (7) and sub-paragraph (10) of paragraph 11 of this Schedule:

Provided that the Board of Trade may direct that any such assurance company whose business includes to a substantial extent business other than assurance business shall comply with all the requirements of the said Part I or such of them as may be specified in the direction and shall comply therewith as respects either the whole of its business or such part thereof as may be so specified.

(2) Where an assurance company is entitled to the benefit of this paragraph, then any wholly owned subsidiary thereof shall also be so entitled if its business consists only of business which is complementary to assurance business of the classes carried on by the assurance company.

(3) For the purposes of this paragraph a company shall be deemed to be the wholly owned subsidiary of an assurance company if it has no members except the assurance company and the assurance company's wholly owned subsidiaries and its or their nominees.

25.—(1) A company to which this paragraph applies shall not be subject to the following requirements of this Schedule, that is to say—

- (a) as respects its balance sheet, those of paragraph 4 (except so far as the said paragraph relates to fixed and current assets) and paragraphs 5, 6 and 7; and
- (b) as respects its profit and loss account, those of sub-paragraph (1) (a), (e) and (f) of paragraph 12;

but a company taking advantage of this paragraph shall be subject, instead of the said requirements, to any prescribed conditions as respects matters to be stated in its accounts or by way of note thereto and as respects information to be furnished to the Board of Trade or a person authorised by them to require it.

(2) The accounts of a company shall not be deemed, by reason only of the fact that they do not comply with any requirements of Part I of this Schedule from which the company is exempt by virtue of this paragraph, not to give the true and fair view required by this Act.

(3) This paragraph applies to companies of any class proscribed for the purposes thereof, and a class of companies may be so proscribed if it appears to the Board of Trade desirable in the national interest:

Provided that, if the Board of Trade are satisfied that any of the conditions proscribed for the purposes of this paragraph has not been complied with in the case of any company, they may direct that so long as the direction continues in force this paragraph shall not apply to the company.

26. Where a company entitled to the benefit of any provisions contained in this Part of this Schedule is a holding company, the reference in Part II of this Schedule to consolidated accounts complying with the requirements of this Act shall, in relation to consolidated accounts of that company, be construed as referring to those requirements in so far only as they apply to the separate accounts of that company.

PART IV.

INTERPRETATION OF SCHEDULE.

27.—(1) For the purposes of this Schedule, unless the context otherwise requires—

- (a) the expression "provision" shall, subject to sub-paragraph (2) of this paragraph, mean any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing

for any known liability of which the amount cannot be determined with substantial accuracy ;

- (b) the expression " reserve " shall not, subject as aforesaid, include any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing for any known liability ;

- (c) the expression " capital reserve " shall not include any amount regarded as free for distribution through the profit and loss account and the expression " revenue reserve " shall mean any reserve other than a capital reserve ;

and in this paragraph the expression " liability " shall include all liabilities in respect of expenditure contracted for and all disputed or contingent liabilities.

(2) Where—

- (a) any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets, not being an amount written off in relation to fixed assets before the commencement of this Act ; or

- (b) any amount retained by way of providing for any known liability ;

is in excess of that which in the opinion of the directors is reasonably necessary for the purpose, the excess shall be treated for the purposes of this Schedule as a reserve and not as a provision.

28. For the purposes aforesaid, the expression " quoted investment " means an investment as respects which there has been granted a quotation or permission to deal on a recognised stock exchange, or on any stock exchange of repute outside Great Britain, and the expression " unquoted investment " shall be construed accordingly.

NINTH SCHEDULE

MATTERS TO BE EXPRESSLY STATED IN AUDITORS' REPORT.

1. Whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of their audit.

2. Whether, in their opinion, proper books of account have been kept by the company, so far as appears from their examination of those books, and proper returns adequate for the purposes of their audit have been received from branches not visited by them.

3.—(1) Whether the company's balance sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account dealt with by the report are in agreement with the books of account and returns.

(2) Whether, in their opinion and to the best of their information and according to the explanations given them, the said accounts give the information required by this Act in the manner so required and give a true and fair view—

(a) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year ; and

(b) in the case of the profit and loss account, of the profit or loss for its financial year ;

or, as the case may be, give a true and fair view thereof subject to the non-disclosure of any matters (to be indicated in the report) which by virtue of Part III of the Eighth Schedule to this Act are not required to be disclosed.

4. In the case of a holding company submitting group accounts whether, in their opinion, the group accounts have been properly prepared in accordance with the provisions of this Act so as to give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries dealt with thereby, so far as concerns members of the company, or, as the case may be, so as to give a true and fair view thereof subject to the non-disclosure of any matters (to be indicated in the report) which by virtue of Part III of the Eighth Schedule to this Act are not required to be disclosed.

BLANK

Previous

Year

(d)

BALANCE SHEET

	£	£
I. CAPITAL—		
Authorised in shares of £1 each:		
Ordinary Shares	10,000	
8% Redeemable Preference Shares ...	90,000	40,000
Issued in shares of £1 each fully paid:		
Ordinary Shares	10,000	
8% Redeemable Preference Shares re-		
deemable at par	30,000	
Less: Nominal value of 5,000 shares		
redeemed during the year	5,000	
	25,000	35,000
<i>Note: The earliest date on which the company has power to redeem the above preference shares is July 31, 1948 (b).</i>		
II. CAPITAL REDEMPTION RESERVE FUND—		
Amount set aside out of profits this year		5,000
III. SHARE PREMIUM ACCOUNT (c)		
Balance at January 1, 1948	5,000	
Less: Preliminary Expenses written off per		
contra	5,000	—
IV. CAPITAL RESERVES—		
Surplus arising on book values after revaluation in		
1947		4,000
V. REVENUE RESERVES—		
Dividend Equalisation Account:		
Balance at January 1, 1948	3,000	
Less: Amount transferred to Profit and		
Loss Account	2,000	
	1,000	
Profit and Loss Account, being undistri-		
buted balance at the end of the year	1,300	2,300
VI. INCOME TAX RESERVE—		
Income Tax Schedule D 1949/50 (subject to agree-		
ment)		10,800
TOTAL SHARE CAPITAL AND RESERVES		57,100
VII. DEBENTURES—		
Authorised amount £10,000:		
Amount issued and outstanding (Secured on		
Plant and Machinery)		5,000
VIII. 6% LOAN REPAYABLE BY 1950 (Unsecured) ...		2,000
IX. CURRENT LIABILITIES—		
Sundry Trade Creditors and Accruing Expenses ...	13,500	
Interest accrued on Debentures and Fixed Loan ...	165	
Current Taxation 1948/49 (as agreed)	7,335	
Profit Tax on profit for the year (subject to agree-		
ment)	2,500	
	23,500	

LIMITED

AT DECEMBER 31, 1948 (a)

Previous

Year

£ (d)

I. FIXED ASSETS (c)

At cost or valuation with subsequent additions at cost, less sales at cost prices less amounts written off and depreciation—

PROPERTIES, PLANT AND MACHINERY, TRANSPORT AND OFFICE EQUIPMENT

	(1) At Cost	(2) At Valuation (1947)	(3) Additions less sales during year	(4) Aggregation (Cols. 1 to 3).	(5) Depreciation on Column 1	(6) Depreciation on Column 2	Net amount (Cols. 4 less 5-6)
Freshhold ...	20,000	5,000	5,000	30,000	1,500	500	28,000
Leasehold ...	10,000	—	—	10,000	6,000	1,000	3,000
Plant and Machinery ...	10,000	5,000	—	15,000	6,000	2,000	7,000
Transport ...	5,000	—	—	5,000	1,500	500	3,000
Office Equipment ...	2,000	—	1,000	3,000	1,000	300	1,700
	<u>£47,000</u>	<u>£10,000</u>	<u>£6,000</u>	<u>£63,000</u>	<u>£16,000</u>	<u>£4,300</u>	<u>£42,700</u>

II. INVESTMENTS at cost—

	Quoted		Unquoted		£
	£	*	£	†	£
Trade	5,000
Other	2,000
		<u>6,000</u>		<u>1,000</u>	

* Market value at December 31, 1948—£6,250

† Director's valuation—£1,200

III. INTERESTS IN SUBSIDIARY COMPANY (not consolidated)—

Shares at cost ...	...	...	...	...	8,000
Debentures at cost ...	...	...	...	...	2,000
					<u>10,000</u>

IV. GOODWILL, TRADE MARKS AND PATENTS at cost less amounts written off and as shown by the books of the company ...

1,000

V. CURRENT ASSETS—

Stocks on hand at or below cost as valued by a director ...	...	...	...	...	4,000
Trade Debts and Payments in Advance less provision for Bad and Doubtful Debts ...	...	...	...	...	15,500
Advances on Current Account to Subsidiary Company ...	...	...	...	...	3,500
Cash and Bank Balances ...	...	...	...	...	<u>10,000</u>
					33,000

VI. LOANS TO EMPLOYEES (f) for purchase of Shares in the company as per the last Balance Sheet ...

500

VII. LOANS TO DIRECTORS OR OFFICERS (f) (as approved by the company pursuant to Resolution passed

X. PROVISIONS—

Contracts Contingencies Account :	...	...	3,000	
Properties Repairs Account :				
Balance at January 1, 1948	...		1,000	
Add : Amount transferred from profit and loss				
Account	...	...	2,000	3,000
				6,000

XI. DIVIDENDS RECOMMENDED FOR DISTRIBUTION—

20% Ordinary Dividend for the year ended Decem-			
ber 31, 1948, less tax at 9s. in the £	...	...	1,100

Notes : Contingent Liabilities not provided for in the liabilities as shown above—

(i) *Amount uncalled in respect of Trade Investments £2,000.*

(ii) *Commitments for Capital Expenditure at December 31, 1948 amounted to £10,000.*

(Signed) A. PENN } Directors. (g)
B. COACH }

£

£94,700

AUDITORS' REPORT TO THE MEMBERS OF BLANK LIMITED (h)
We report to the members of Blank Limited that we have examined the above Balance Sheet and annexed Profit and Loss Account with the books and accounts of the company, which we have audited, for the year ended December 31, 1948. We have obtained all the information and explanations which to the best of our knowledge and belief were necessary for the purposes of the audit. In our opinion, proper books of account have been kept, so far as appears from our examination thereof, and the Balance Sheet and Profit and Loss Account are in agreement therewith.

In our opinion and to the best of our information and according to the explanations given us, the said accounts are properly drawn up as required by law and exhibit a true and fair view of the state of the company's affairs as at the end of its financial year and of the profit and loss for the year ended December 31, 1948.

TICK & CO.,

London, January 31, 1949,

Auditors

BALANCE SHEET—SINGLE COMPANY , 435

in General Meeting held on July 31, 1948 ...	500
<i>(This amount has since been repaid).</i>	
VIII. CAPITAL EXPENSES at cost less amounts written off	
Preliminary Expenses	5,000
Less : Amount written off against Share	
Premium Account per contra ...	<u>5,000</u>
	—

£

£94,700

NOTES

In these notes all references are to the Companies Act, 1948.

- (a) S. 149 and Eighth Sched., p. 235, *ante*. (b) P. 120 *ante* and Eighth Sched. 2 (a).
 (c) S. 56 and p. 137, *ante*. (d) Eighth Sched., para. 14 (5)
 (e) Eighth Sched. 4 (2) (f) S. 197 and p. 211, *ante*.
 (g) S. 155.

(h) As to the contents of the Auditors' report, see S. 162 and the Ninth Sched. The Profit and Loss Account must be annexed to the Balance Sheet (S. 156) and the Auditors' Report (as above) must be attached thereto (S. 156). The Directors' Report must be attached to the Balance Sheet (S. 157 and p. 212, *ante*).

BLANK COMPANY
PROFIT AND LOSS ACCOUNT FOR

*Corresponding
figures for
previous year (b)*

	£	£
To DIRECTORS' EMOLUMENTS (c)		5,000
DIRECTORS' PENSIONS (c)		1,500
COMPENSATION TO DIRECTORS FOR LOSS OF OFFICE (c)		1,000
AUDITORS' FEE		250
DEBENTURE INTEREST (Net)		110
FIXED LOAN INTEREST (Net)		55
DEPRECIATION AND AMOUNTS WRITTEN OFF—		
Freehold Property	500	
Leasehold Property	1,000	
Plant and Machinery	2,000	
Transport	500	
Office Equipment (d)	300	
		<u>4,300</u>
CAPITAL REDEMPTION RESERVE FUND—		
Amount transferred pursuant to resolution passed in General Meeting in 1947—annual amount set aside out of profits to redeem 8% Redeemable Preference Shares at par		5,000
RESERVES—		
Transfer to Property Repair Account		2,000
PROVISION for Contract Contingencies		3,000
TAXATION—		
Income Tax Schedule D 1949/50 (subject to agreement)	10,800	
Profit Tax on profits for the year	2,500	
Schedule A 1948/49 and tax on investment income less tax retained on interest paid during the year	1,000	14,300
BALANCE OF PROFIT FOR THE YEAR, carried down		<u>1,000</u>
		<u>£37,515</u>
To DIVIDENDS PROPOSED AND PAID—		
Preference Dividend paid for the year ended December 31, 1948 less tax at 9s. in the £	1,100	
20% Ordinary Dividend proposed for the year ended December 31, 1948 less tax at 9s. in the £	1,100	
		<u>2,200</u>
BALANCE CARRIED TO BALANCE SHEET, being undistributed profit at the end of the year		1,300
£		<u>£3,500</u>

PROFIT AND LOSS ACCOUNT—SINGLE COMPANY 437

LIMITED

THE YEAR ENDED DECEMBER 31, 1948 (a)

Corresponding
figures for
previous year
£

	£	£
BY PROFIT FOR THE FINANCIAL YEAR AS ABOVE BEFORE CHARGING THE EXPENSE CONTRA OR THE RECEIPTS AS BELOW		33,515
INCOME FROM INVESTMENTS (Gross)—		
Dividends from Subsidiary Company	1,600	
Dividends from Trade Investments	200	
Other Dividends and Interest	200	
(Tax deducted £900)		2,000
INCOME OF A NON-RECURRENT NATURE—		
Profit on sale of fixed assets		1,000
Provision for deferred repairs in prior years in excess of requirements now brought in		1,000

£	£37,515
BY BALANCE OF PROFIT FOR THE YEAR, brought down ...	1,000
BALANCE OF UNDISTRIBUTED PROFIT BROUGHT FORWARD FROM 1947	500
RESERVE—amount brought in from Dividend Equalisation Account	2,000
Note: The directors of the company received £500 as fees from the company's subsidiary to which Board they were nominated by the company. Additions of loose tools during the period have been charged to Cost of Production	
£	£3,500

NOTES

- (a) Eighth Sched., paras. 12 to 14 and p. 235, *ante*
 (b) *Ibid.*, para. 14 (5). (c) S. 196.
 (d) S. 58, Eighth Sched., para. 12 and p. 120, *ante*.

**CONSOLIDATED BALANCE SHEET OF ORDINARY
SERVICES LIMITED (WHOSE ACCOUNTS ARE MADE
BELOW AS REGARDS DATES) AT DECEMBER 31, 1948**

(Adjusted to

Previous
Period
£

		£
I. SHARE CAPITAL AND SURPLUSES OF ORDINARY (HOLDINGS) LIMITED (b)		
CAPITAL—Authorised and Issued:		
70,000 Ordinary Shares of £1 each, fully paid ...		70,000
SHARE PREMIUM ACCOUNT as per last Balance Sheet		3,500
CAPITAL RESERVE—		
Surplus on book values on revaluation of fixed assets in 1946 ...	6,000	
Add: Amount transferred from Profit and Loss Account this period ...	1,000	
		7,000
REVENUE RESERVES AND UNDISTRIBUTED PROFITS—		
Dividend Equalisation Account:		
Balance at January 1, 1948 ...	3,000	
Less: Transferred to Profit and Loss Account this period ...	1,000	2,000
Profit and Loss Account: ...		
Holding Company ...	658	
Subsidiary Company ...	200	
		858
		88,358
II. TAXATION RESERVE—		
Income Tax Schedule D 1949/50 (subject to agreement) ...		3,700
III. SHARE CAPITAL AND SURPLUS OF OUTSIDE SHARE- HOLDERS OF SUBSIDIARY COMPANY ...		
		4,000
IV. DEBENTURES—		
4% Mortgage—Authorised £10,000:		
Amount issued and outstanding (secured on certain fixed assets) ...		3,000
V. 4% LOAN REFAYABLE BY 1950 ...		
		2,000
VI. CURRENT LIABILITIES—		
Sundry Trade Creditors and Accruing Expenses ...	25,940	
Interest accrued ...	110	
Inter-company balances (due to varying balancing dates) ...	500	
Current Taxation 1948/49 (as agreed) ...	3,957	
Profit Tax on profits for the year (subject to agreement) ...	1,400	
		31,807

CONSOLIDATED BALANCE SHEET—HOLDING COMPANY 439

(HOLDINGS) LIMITED AND ITS SUBSIDIARY DEPENDENT
UP TO 30TH NOVEMBER (AS TO WHICH SEE NOTE

(a).

nearest £)

Previous
Year
£

	£	£	£
I. FIXED ASSETS (b) at cost or valuation, including additions, less sales at cost subsequent to valuation and amounts written off—			
FRESHOLD PROPERTY—			
Holding Company at valuation in 1946 ...	20,000		
At cost not included in valuation ...	5,000		
	25,000		
Purchases less Sales subsequent to valuation at cost, in previous periods :			
Holding Company ...	18,000		
Subsidiary Company ...	7,000		
	25,000		
	50,000		
Additions less sales at cost this period :			
Holding Company ...	2,000		
Subsidiary Company ...	3,000		
	5,000		
AGGREGATE COST OR VALUATION ...	55,000		
Less : Amounts written off—			
	Previous periods	This period	
	£	£	
Holding Company ...	3,000	500	
Subsidiary ...	1,000	250	
	4,000	750	
		4,750	
			50,250
PLANT AND MACHINERY, TRANSPORT AND OFFICE EQUIPMENT—			
	At Cost	Less Depreciation	
		Previous This	
	£	periods period	
	£	£	£
Plant and Machinery	25,000	8,000	2,500
Transport ...	5,000	1,000	1,000
Office Equipment	4,000	500	200
	£34,000	£9,500	£3,700
II. GOODWILL at cost, being premium paid by holding company on acquisition of shares in subsidiary company ...			5,000
III. INTEREST IN SUB-SUBSIDIARY COMPANY—Shares at cost ...			5,000
(No accounts have yet been prepared by this company which was incorporated on December 1, 1948).			

VII. PROVISIONS—

Contract Contingencies ;	
Amount set aside from profits for this period	1,000
Deferred Repairs :	
Balances at January 1, 1948	500
Less Amount transferred from Profit and Loss Account being no longer required	500
	<hr/>

VIII. DIVIDENDS PROPOSED FOR PAYMENT (net)—

Holding Company	£ 850
Outside Shareholders of Subsidiary Company ...	135
	<hr/>
	3,985

Notes : The consolidation does not include the case of a sub-subsidiary company of which no accounts are yet available due to that company having been incorporated on December 1, 1948.

Certain currency assets of the holding company have been converted into sterling at Bank of England official rates.

There are contingent liabilities of £2,000 in respect of investments not fully paid.

The financial year of the subsidiary company does not coincide with the holding company, as if it did, the preparation of consolidated accounts would be delayed (c).

(Signed) $\left. \begin{array}{l} \text{E. C. RICH} \\ \text{U. E. STIRLING} \end{array} \right\} \text{Directors. (d)}$

£

£132,950

AUDITORS' REPORT (f)

We report to the members of Ordinary (Holdings) Limited that we have examined the above Consolidated Balance Sheet and annexed Consolidated Profit and Loss Account with the books of the Holding Company, and the audited accounts of the Subsidiary Company Dependent Services Limited consolidated therein. One wholly owned Sub-Subsidiary Company, incorporated on December 1, 1948, has not made up any accounts, and its results are not consolidated herein. Subject to this, in our opinion, the Group Accounts have been properly prepared in accordance with law so as to give a true and fair view of the state of affairs of Ordinary (Holdings) Limited and its subsidiary, so far as concerns the members of the company.

TICK & CO.,
Auditors.

London, January 31, 1949.

CONSOLIDATED BALANCE SHEET—HOLDING COMPANY 441

IV. INVESTMENTS at cost—		Quoted * £	Unquoted † £	
Trade—Holding Company ...		5,000	—	
Subsidiary Company ...		5,000	—	
Other—Holding Company ...		10,000	1,000	
		<u>£20,000</u>	<u>£1,000</u>	
		* <i>Market value at December 31, 1948—£20,250</i>		21,000
		† <i>Directors' valuation—£1,100</i>		
V. CURRENT ASSETS—				
	Holding Company £	Sub- sidiary Company £	Total £	
Stocks on hand at or below cost as certified by the company's officials ...	8,000	4,000	12,000	
Sundry Trade Debtors and Payments in Advance less provision for doubt- ful debts ...	4,000	3,000	7,000	
Amount owing by Sub- Sidiary Company on Current Account (not consolidated) ...	1,000	—	1,000	
Cash and Bank Balances	6,000	2,000	8,000	
	<u>£19,000</u>	<u>£9,000</u>	<u>£28,000</u>	28,000
VI. LOANS TO EMPLOYEES (e) under share investment scheme per last Balance Sheet ...				
	...	...	...	1,000
VII. CAPITAL EXPENSES at cost— Preliminary Expenses of Subsidiary Company ...				
				2,000

£

£132,950

NOTES

(a) Ss. 149 to 152 Eighth Sched., Parts I and II and pp. 416, 423, *ante*

(b) Eighth Sched., para. 4 (2).

(c) *Ibid*, para. 22.

(d) S. 155.

(e) S. 197 and p. 211 *ante*.

(f) See note (h), p. 435 *ante*

**CONSOLIDATED PROFIT AND LOSS ACCOUNT FOR
(HOLDINGS) LIMITED AND ITS SUBSIDIARY DEPENDENT**

(Adjusted to

*Previous
Period*
£

	£	£
TO AUDITORS' FEES AND EXPENSES		750
DEBENTURE INTEREST (net)		66
LOAN INTEREST (net)		44
DEPRECIATION AND AMOUNTS WRITTEN OFF—		
Freehold Properties	750	
Plant and Machinery	2,500	
Transport	1,000	
Office Equipment	200	4,450
BRITISH TAXATION—		
Schedule D 1949/50 (subject to agreement)	3,700	
Profit Tax on profits for the year	1,400	
Schedule A 1948/49 and tax on investment income less tax retained on interest paid during the year	780	5,880
RESERVES—Amount transferred to Capital Reserve account		1,000
PROVISIONS—Amount transferred to Contracts Contingencies Account		1,000
BALANCE BEING CONSOLIDATED INCOME FOR THE YEAR—		
Belonging to Minority Shareholders of Subsidiary Company	500	
Belonging to Group	1,743	2,243
<hr/> £		<hr/> £15,433

TO DIVIDENDS PROPOSED (net)—	
10% Ordinary Dividend for the year ended December 31, 1948 less tax at 9s. in the £	3,850
10% Ordinary Dividend provided for minority interests in subsidiary company, less tax at 9s. in the £ (in respect of the subsidiary year ended November 30, 1948)	135
BALANCE BEING UNDISTRIBUTED, PROFITS CARRIED FORWARD TO NEXT YEAR—	
Group Interest (£200 is retained in the accounts of the subsidiary company)	858
Minority Interest	400
<hr/> £	<hr/> £5,243

CONSOLIDATED PROFIT & LOSS ACCOUNT—HOLDING CO. 443

THE YEAR ENDED DECEMBER 31, 1948 OF ORDINARY
DENT SERVICES LIMITED. (a)

the nearest £)

Previous
Year (b)
£

	£
By COMBINED TRADING PROFIT AFTER PROVIDING FOR EXPENSES OF WORKING AND MANAGEMENT BUT BEFORE CHARGING THE ITEMS PER CONTRA ON THE RECEIPTS SHOWN BELOW—	13,303
INVESTMENT INCOME (gross)—	
Trade	330
Other	
(Tax deducted—£284)	300
	630
PROVISIONS—Past over-provision for deferred repairs ...	500
NON-RECURRING PROFITS—	
Profit on sale of property	1,000

<u>£</u>	<u>£15,433</u>
----------	----------------

By BALANCE OF CONSOLIDATED INCOME FOR THE YEAR, brought down—	
Belonging to Group	1,743
Belonging to Minority Interests	500
	2,243
BALANCE BROUGHT FORWARD FROM 1947	2,000
RESERVES—Amount transferred from Dividend Equalisa- tion Account	1,000

<u>£</u>	<u>£5,243</u>
----------	---------------

NOTES

(a) Eighth Sched., Parts I and II, pp 416, 423 *ante*.

(b) *Ibid.*, para. 14 (5).

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